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Supreme Court
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SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

Petitioner,

vs.

ALFRED SPENCER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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To the Honorable Charles Evans Hughes, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Alfred Spencer, respondent herein, files this brief in opposition to the Petition for Writ of Certiorari to the Su-

preme Court of the State of California to review a certain judgment of said court in favor of respondent rendered on September 3, 1935, reported in 90 *Cal. Dec.* 227, 48 *Pac.* 2*d*, 678, (R. 102), but not yet reported in the permanent bound volumes of reports edited by the official reporter.

The judgment of the Supreme Court affirms a judgment of the Superior Court of the State of California in and for the City and County of San Francisco in an action, under the Jones Act, for damages for personal injuries sustained by respondent while a seaman in the employ of petitioner.

The petitioner appealed to the District Court of Appeal of the State of California, First Appellate District, from the adverse judgment and the District Court of Appeal on December 28, 1934, reversed the judgment of the said Superior Court, but the plaintiff and respondent filed a petition for transfer of said cause to the Supreme Court of the State of California, for hearing and determination, and said petition was granted and the said appeal matter transferred to said Supreme Court, and that court rendered its opinion and judgment on September 3, 1935, affirming the judgment of said Superior Court. Counsel for petitioner states that this last named judgment, now in effect, "reverses a judgment of the District Court of Appeal", (Pet. 1) and incorporates a copy of the opinion of the District Court of Appeal in the record here (R. 99), and bases argument thereon, (Br. 25) and uses its language verbatim in commenting on the facts in several instances. (Pet. 5; Br. 17.) Respondent points out, that the use of that opinion by petitioner is based on an erroneous intimation that it still has some force and effect, whereas it has none. as a precedent or otherwise.

In *Estate of Stierlen*, 199 Cal. 140, 144, the Court said:

> "The petition of appellant was granted and this court made an order transferring said cause to this court for hearing. This was done under the authority of section 4 of article VI of the constitution, which provides as follows: 'The Supreme Court shall have power * * * to order any cause pending before the District Court of Appeal to be heard and determined by the Supreme Court.' 'When such an order is made within the time prescribed in the Constitution the decision of the district court of appeal is vacated and the matter is transferred to this court for a determination of all the material questions involved therein, to the same extent as if originally instituted in this court.' (*Rockridge Place Co.* v. *City Council*, 178 Cal. 58, 60 (172 Pac. 1110).)"

NATURE OF CASE

An exception must be made to petitioner's flat statement under this heading that "The fourth section of the Federal Employers' Liability Act * * * preserves to the employer the defense of assumption of risk". The last mentioned Act, (Sec. 4) (App. to Pet. 46) (Act of April 22, 1908, Chap. 149, 35 Stat. 65, 54 U. S. C. A. 45) does not by its terms preserve to such employer the defense of assumption of risk, but only provides that "such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee". While admittedly the defense of assumption of risk is available in action under the Federal Employers' Liability Act, and under the Jones Act, generally speaking, and has never been denied in this case, it is well

settled that the defense of assumption of risk in actions by a seaman under the Jones Act, is not applicable under the same definitions or to the same extent as in actions under the Federal Employers Liability Act.

QUESTIONS INVOLVED

FIRST QUESTION: Respondent submits that the first question, as petitioner states it, (Pet. 2) is not involved, for the primary reason that petitioner bases it on purported facts, in several instances which do not exist in the case, and in other instances, on purported facts which appear in the record to be contrary to counsel's statement, to-wit: (1) It does not appear at all that the respondent was not under articles. (2) It nowhere appears in the record that he could quit his employment without penalty or forfeiture. (3) The petitioner did not support the plea of assumption of risk by any evidence that the risks of the employment by reason of which respondent was injured were *ordinary* hazards of the employment but on the contrary only by evidence that they existed for the very first time, (R. 134) and contrary to the usual custom, (R. 132) as far as the placing of the lumber was concerned, and as far as the open hold was concerned, only by evidence that it was not "practical" to close it as it might be needed (R. 71), but that they had no intentions of using it that day (R. 74); the respondent's witnesses testifying that it was customary to close it under the circumstances existing, (Spencer, R. 117; Paul, R. 128; Thorne, R. 143) and petitioner's witness, the captain, admitting this (R. 131).

It appears after studying petitioner's brief that there are only *three* instructions which he presents which mention the defense of assumption of risk. These are II (R.

94), III (R. 94), and XIX (R. 98). No. XIX relates only to the open hold. In it petitioner asked the court to instruct the jury that if respondent helped remove the hatches and knew they were off, that the respondent assumed the risk of any injury from the open hold. It asked the jury to find that the respondent assumed the risk of falling into the open hold, because even if under the orders of the mate he assisted in taking off the hatches, and even if the open hold was not an ordinary hazard of employment under the circumstances, and even if the hold was left open contrary to the usual custom, and even if it was negligent to leave it open under the circumstances and even if the respondent was ordered by petitioner or his mate to work next to and high above said hold, under protest, and when it could have been conveniently and speedily closed. Surely there is no question but what this instruction was properly refused.

The jury by its verdict found against the facts which were the premise of the second, No. III (R. 94) and a mere reading of it shows that it was otherwise improper. This leaves only the first one mentioned, remaining on the defense, but it was not only inapplicable under the facts of this case, and the law applying, but is so broad and general, that it is stated as a mere conclusion, and could give the jury no adequate understanding of the defense.

But in view of the judgment of the Supreme Court of the State of California, and the verdict of the jury resolving all disputed questions in favor of respondent, and with reference to petitioner's subject matter, respondent submits such question might be stated as follows:

Whether in an action under the Jones Act by a seaman who has signed up as a member of the crew for a certain

voyage from San Francisco to Columbia River Ports, some in the State of Washington, and intermediate ports, and return to San Francisco (R. 113), for damages for personal injuries sustained by the toppling of an insecure and high tier of landed slingloads, on which plaintiff had been ordered by the mate, to work, under protest, next to an open hold, the hold not being used, whereby plaintiff was precipitated about 18 feet to the bottom of the hold, in which action the operator of the vessel, his employer, pleads the defense of assumption of the ordinary risks and hazards incidental to the employment, but supports the defense only by evidence that the mate had never before ordered slingloads of lumber put in any such place aboard the vessel, and where it was admitted by petitioner's witnesses and his counsel that lumber in slingloads landed thus, would be more apt to topple than when piled in the customary manner, piece by piece by hand all over the deck, with lath binders between, and where it was not customary in any event to put lumber in any such place as petitioner did, as there should have been a space between the lumber and the hatch coaming, to allow seamen to walk around same on the deck, and where the hold was left open while said plaintiff was ordered to work getting out said slingloads, right next to and high above said open hold and the hold was not used the entire morning of the injury, and where there were no orders given to the officers of the vessel to use the hold for any purpose and where the hatch covers could have been put on and the hold covered in five to ten minutes, and where it was customary to close the hold; and where the case went to the jury on the broad general issue of whether or not defendant had furnished plaintiff with a reasonably safe place to work, under all the circumstances of the business; and where the jury brought in a verdict for the

respondent, was it prejudicial and reversible error for the trial court to refuse to give the specific instructions proposed by the petitioner alleged to be applicable to the defense of assumption of risk, and where the Supreme Court of the State of California bases its judgment of affirmance upon the determination of the question of "whether under the facts, this defense (Assumption of Risk) was available to the defendant and the failure to instruct the jury thereon constituted prejudicial error", (R. 103) and where the said Supreme Court bases its judgment *upon the assumption* that the plaintiff "assumed the risks ordinarily incident to the employment" (R. 104) but holds that "the facts do not present such a case as, without question, entitled the defendant to the instructions on the question of assumption of risk, and the withholding of the instruction on that question, if error, was not prejudicial to him" (R. 105), is the petitioner entitled to a Writ of Certiorari from this court to the Supreme Court of the State of California and a re-examination of the facts by this court to determine whether the facts of this particular case justified the trial court in sending the case to the jury upon the issue of safe place to work, without giving the jury any specific instruction on assumption of risk which petitioner proposed, and from said judgment of the Supreme Court of the State of California, does it appear that the petitioner was denied a right, privilege, or immunity claimed by him under a statute of the United States by failure to give any specific instruction which he proposed, and if so, is such question a federal question, and is it of such gravity and general importance as to justify this United States Supreme Court in redetermining the cause?

SECOND QUESTION: The second alleged question involved, as stated by petitioner (Pet. 3), is practically

the same as the first question. It would be restated by respondent as follows: In such an action and under such circumstances may the court instruct the jury upon the issue of whether or not the defendant has furnished plaintiff with a reasonably safe place to work under all the circumstances of the business, without giving the specific instructions allegedly bearing upon the defense of assumption of the risk of ordinary and usual hazards, which the defendant in this particular case proposed?

THIRD QUESTION: (Pet. 3) This question set forth by petitioner, it is contended, is not involved in this proceeding for Writ of Certiorari at all. It merely relates to a defense of what constituted the "place to work"; is unimportant and could not go to the extent of depriving petitioner of any right, privilege, or immunity under a statute of the United States. It has no bearing on the failure to give petitioner's instructions allegedly bearing on the defense of assumption of risk.

FOURTH QUESTION: (Pet. 4.) It is contended that the fourth question as stated by petitioner, is not involved in this proceeding. In fact respondent concedes that it may be answered in the affirmative. It is merely a question as to whether in any negligence case, there must be a casual connection between the negligence and the injury.

STATEMENT OF CASE

Counsel for petitioner states that respondent had not signed articles (Br. 26). Under the Act of June 19th, 1886, Chap. 421, Sec. 2, as amended, April 11, 1904 (46 U. S. C. A. 563) vessels in the coastwise trade may require seamen to sign articles before a shipping commis-

sioner and whether or not Spencer did so does not appear. As to counsel's statement that Spencer could have quit his job at any time he liked without penalty or forfeiture; (Pet. Br. 26), the record references given merely establish that if Spencer quit voluntarily, they could hold up his wages for three days, and that he did not have any money to get back to San Francisco, the home port, where he lived, (R. 120) and that if the mate discharged him for disobeying orders he had to pay him right away.

There was no evidence as to penalties or forfeitures generally that the respondent seaman may or may not have suffered if he had quit the vessel voluntarily at Vallejo before she finished her voyage at San Francisco. He was not paid just like a land employee, and did not sign an ordinary payroll as petitioner states, but signed the usual seamen's payroll, which was also in the form of a release, and reflected characteristically, the strictly maritime nature of plaintiff's employment, the following being quoted from it:

"Payroll, Voyage No. 59. We, the undersigned, late mariners on board the S. S. Fort Bragg of San Francisco, on her late voyage to Columbia River and return, now performed to this place of payment * * * acknowledged * * * the sum set opposite our names, it being in full amount of our wages for services, and of all demands for assault and battery, or imprisonment of whatever name and nature, against said ——, her owners or officers * * *." (R. 113.)

We note that in his statement of the case, counsel for petitioner follows verbatim the statement of the District Court of Appeal, made in its superseded opinion (Pet. 5,

l. 5, R. 100, Fol. 149) in stating that "the ship's hold was open, which fact was admittedly known to respondent" and add "who made no protest concerning this condition (R. 30, 32) in fact, he assisted in removing the hatch covers at San Francisco before the ship sailed for Vallejo" (R. 47). Here counsel omits important testimony which throws an entirely different light upon the foregoing statements. While it is true that the respondent made no protest concerning the open hold, the testimony is that Paul, Spencer's working partner, did protest to the mate about the hold being left open, in Spencer's hearing and presence. That the mate refused to put the hatches on although it would only have taken 5 or 10 minutes to do so, and they were not using the hold at all, and that the mate told them to go ahead and do their work. This was testified to by both Spencer and Paul (R. 32, 113, 125). Obviously it would have been futile for the respondent seaman to repeat the same protest. In fact, in view of the mate's order to go ahead and do their work, it would have been insubordination. While it is true that plaintiff assisted in removing the hatch covers at San Francisco, it is a matter of which this court will take judicial knowledge, and in fact there is undisputed testimony to that effect; that seamen do nothing except under the orders of the mate or captain (R. 25, 30).

But these are all questions of fact detail, with which it is believed this court is not concerned. The case went to the jury on the broad general issue of whether or not defendant had furnished plaintiff with a reasonably safe place to work, and all of these detailed contentions as to the facts were presumably settled by the jury's verdict in favor of plaintiff and respondent.

In petitioner's statement of facts, he, in several instances. states as proven facts, merely the testimony of his own witnesses which respondent's witnesses disputed, and which conflict must be presumed to have been resolved in favor of respondent. For instance, counsel's statement that when discharging it is not practical to keep the hatches closed, because lumber in the hold may be wanted (Pet. 5, Pet. Br. 18). While it is true that Vartnaw, the first mate testified for petitioner that it was not "practical" to put the hatches on because they might want some of the lumber from the hold (R. 71), the same witness testified that he didn't know when it was going to be taken out (R. 70), and that they were not unloading anything from the hatch or hold that morning (R. 74), (the accident happened at about 9 o'clock A. M.) and that they had no orders to unload anything from the hold the morning of the accident (R. 73, 74), and that he had no knowledge that they even intended to unload in the afternoon from the hold (R. 74), and the captain testified for the petitioner that it was a general rule of safety on all vessels that whenever operations through the hatch were suspended, that the hatch covers should be put on (R. 131). The respondent and two of his witnesses testified that it was the custom when working a deck load of lumber, even when properly hand piled all over the deck, as usual, and the hatch was not being used, to put the hatch covers on and close the hold. (Spencer R. 117, Paul R. 128, Thorne R. 143.)

Counsel refers to the evidence given on behalf of petitioner that respondent was standing at the time he fell on hand stowed lumber of the dimension of 1" by 12" and refers to the testimony of petitioner's witness Kruse, the second mate (R. 87). But Kruse testified on cross-exam-

ination that some 1" by 12" 's were stowed and some were landed, (R. 135) and that he didn't know how many landed slingloads were on top of the hand-piled 1" by 12" 's, but that the slingload Spencer and his partner were taking out when he saw them was the one right up level with the timbers (about 14 feet above the deck) (R. 139). But since the undisputed evidence was that at the time the slingload of lumber or a part thereof toppled with Spencer that he was at least 6 feet below the top of the heavy timbers, (R. 122) (R. 40), having taken out the two top slingloads designated as slingloads numbers 2 and 3 (R. 35) on the diagram in evidence (R. 145) and also slingload number 6 (R. 123, 37) and that Spencer was standing down on top of slingload number 9 (R. 40, 41) putting a sling under slingload number 5 (R. 40) to take it out, and since petitioner's own witness, Vartnaw, admitted that the slingloads landed in the narrow space without being hand piled, were two or three slingloads high (R. 68), then taking Kruse's own testimony that Spencer and Paul when he saw Spencer fall were taking out a slingload even with the top of the timber 14 feet above the deck, this would necessarily be the top tier and Spencer would be standing on the second tier and according to Vartnaw's own testimony, there were *two or three* tiers or layers of landed loads, and hence Spencer could not possibly have been standing on hand-piled lumber. Kruse's testimony that he was, was entirely contrary to the testimony of petitioner's other witness Vartnaw, who loaded the vessel. Hence Kruse's testimony was not believeable. Kruse in any event was merely passing from on end of the ship to the other when he claims he looked at Spencer and Paul (R. 77). His testimony did not even raise a real conflict. The jury did not believe it. The Supreme Court of California says:

> "There was undisputed evidence that the lumber, at least from a distance of about four feet from the deck, had been 'landed' rather than stowed,— * * *, and that a portion of the landed lumber toppled with the plaintiff causing him to fall into the hold." (R. 104).

Petitioner's counsel says this is a glaring misstatement of the record (Br. 42). He is referring to the aforesaid testimony of Kruse, as being a dispute, but from the foregoing it appears that the criticism is not justified. Furthermore it is immaterial for if there was any substantial evidence to support the implied finding of the jury to the same effect, it is sufficient. And such evidence was ample. (R. 40, 43, 44, 46, 141, 144.)

Counsel for petitioner states as a proven fact that plaintiff was at the time of his injury pursuing a method of work in disobedience of specific orders and instructions (Pet. 5, Pet. Br.18), but in support of such statement refers merely to the testimony of petitioner's own witness, the captain, that a few minutes after 8 o'clock he picked out Spencer, an experienced seaman, from a group of eight seamen working around the hold and told him not to go "inside of the load" when he was putting the sling on. But the respondent, expressly denied that the captain gave him any such instructions or that he had any conversation at all with the captain that morning, and that the captain didn't come and tell him what to do and that if he didn't know his work they would fire him (R. 121) and that he didn't even see the captain that morning and that the captain was on the dock (R. 122). Thus, the captain's testimony at the most, merely raised a conflict in the evidence which must be presumed to have been resolved by the jury in favor of the respondent.

Counsel states, as an established fact that there were other and safe ways of performing the operation in which respondent was engaged at the time he fell, stating that there were appliances called pick-up hooks which could have been used and were available aboard the vessel and which respondent did not use. But here again counsel is merely stating the testimony of his own witness, the captain, on this fact detail. While the captain testified for the petitioner that the seamen working on the sling-load could tell the winch driver to move the load away from the timbers so "that the men can step right inside" (R. 58), he had theretofore testified that he had instructed Spencer "Not to go inside of the load when he was putting the sling on" (R. 53). The respondent and Paul testified flatly that they were doing the work in the only way that it was possible to do it under the particular circumstances which confronted them in taking out this particular slingload. (Spencer's, R. 48; Paul's, R. 127). Spencer further testified that in this particular case, number 5 slingload, which they were taking out, overlapped number 9 slingload, upon which Spencer was standing, and that it wasn't clear under the forward end of number 5 slingload (R. 47), and that he had to push the sling through and see if it was clear (R. 48). Paul also testified that the slingload had not come quite clear of the other lumber so Spencer had to stick one end of the pick-up sling underneath (R. 126), and that the way Spencer put the sling under the slingload was the customary and proper way for any seaman to put a sling under a slingload under the circumstances existing with regard to this particular situation (R. 126, 127). But these methods of work in any event would have no bearing on the defense of assumption of risk, and petitioner proposed no instruction informing the jury that it did. If Spencer was neg-

ligent in choosing an unsafe method of work, when a safe method was surely and plainly available, this would be contributory negligence only, which would not be a bar to recovery in an action under the Jones Act, but would only go in mitigation damages.

Plaintiff's Exhibit Number 9, the drawings made by the respondent seaman on the blackboard and referred to all through the trial, which diagrams were finally admitted in evidence at the suggestion of counsel for the petitioner, although purportedly over his protest (R. 145), and a photograph of which was made by counsel for defendant and included in Appellant's Brief in the trial court, gives quite a graphic picture of the situation as presented; showing top, side, and end views of the landed slingloads in their relation to the heavy timbers and the open hold, and it seems a photostat thereof could well have been included in petitioner's brief, here.

It appears clearly from these drawings that respondent was working in an enclosed "box", the port and starboard sides being the heavy timbers towering about ten feet high, above the single ledge of slingloads which were being unloaded inside and the aft and forward ends being the octagonal steel tanks set on the deck, reaching about 14 feet above the deck (R. 19, 20). After Spencer and his partner had taken out the three slingloads numbered 2, 3, and 6 on the diagram, Spencer was working on this ledge formed by this slingload between the heavy timbers and the hatch coaming about 5½ or 6 feet above the hatch coaming (R. 40), and the hold being open, he was on a ledge inside of a sort of "pit", it being about 6 feet to the top of the timbers (R. 122) and about 18 feet from where Spencer was standing to the bottom of the hold, which is the distance he fell (R. 103).

It thus appears from the record that all of the foregoing evidence which petitioner says was in support of the defense of assumption of risk was all disputed by respondent's witnesses and also not in fact supported by petitioner's witnesses Vartnaw, or Capt. Samuelson or Kruse. All this evidence referred to by petitioner bore in the last analysis upon the question of whether or not the defendant had furnished the plaintiff with a reasonably safe place to work under all the circumstances of the business. Thus the determination of the question as to whether defendant had furnished plaintiff with a reasonably safe place to work involved the determination of the question by the jury as to whether or not the footing furnished plaintiff to do his work was as reasonably safe as the circumstances of the business would permit. The element of the open hold involved the determination of the question as to whether or not it was negligence on the part of the defendant to leave the hold open under the circumstances of this particular case, and whether or not leaving it open, together with other circumstances surrounding plaintiff's place of work, made plaintiff's place of work unreasonably unsafe. Since the jury found by its general verdict that the defendant failed to furnish plaintiff with a reasonably safe place to work and that such negligence proximately contributed to his injuries, they in legal effect, by the same implied finding, found against what petitioner contends was his evidence on assumption of risk.

The general verdict imported findings in favor of the respondent upon all material issues, and resolved all conflicts in testimony in his favor.

Petersen v. *Klitgaard*, 212 Cal. 516;
Gjurich v. *Fieg*, 164 Cal. 429;

Dreyer v. *Cole*, 210 Cal. 339;
4 C. J. 772.

We quote from the statement of facts of this case as stated by the Supreme Court of the State of California in its opinion and judgment (R. 102).

> "On the particular voyage in question timbers 52 feet long were piled lengthwise of the deck, on the port and starboard sides, to a height of about ten feet above the deck. Between this lumber and the hatch coamings there was a space about forty inches wide, and about forty-five feet in length, the forty-five feet being the distance between two large tanks fore and aft of the hatch. At Coos Bay a quantity of 1 x 12's and 2 x 3's was loaded into the spaces so left on the port and starboard sides of the hatch and between the two tanks, up to the top of the long timbers. No space was left between the load and the hatch coamings.
>
> When the ship docked at Vallejo to take off cargo the plaintiff was ordered to assist in unloading the lumber piled between the large timbers and tanks and the hatch coamings. While this lumber was being unloaded the hatch covers were off. The plaintiff and another were preparing a load of lumber to be swung ashore, about six or eight feet above the hatch coamings. While the plaintiff was attempting to place a cargo sling around a sling load of lumber, he fell into the hold, a distance of about eighteen feet, and was seriously injured.
>
> (R. 104) The accident occured at nine o'clock on the morning of May 4, 1931. The hatch covers had been taken off the night before. There was undisputed evidence that the lumber, at least from a distance of about four feet from the deck, had been 'landed' rather than stowed, that is, placed in sling

loads just as it came from the dock, rather than hand piled piece by piece with laths at stated distances to make a solid packing, and that a portion of the landed lumber toppled with the plaintiff causing him to fall into the hold. It further appeared that a request had been made to replace the hatch covers, but that the plaintiff was ordered to work with the hatch uncovered. It was undisputed that there was no necessity for the hatch to be open, as no unloading from the hold was being done that morning. There was also evidence that it was unusual to load the deck so close to the hatch."

It is believed that under the rule of this court, where the two courts of the State of California, the trial court by the implied finding of the jury based on their general verdict, and the supervision of the judge thereof on Motion for New Trial, and then the Supreme Court of the State of California, as above, have found the facts, as stated by the Supreme Court that this court will probably accept those as facts.

Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139, 145;
The Iroquois, 194 U. S. 240.

This court has frequently stated that it will not consider questions of fact on certiorari.

Houston Oil Co. of Texas v. *Goodrich*, 245 U. S. 440.

JURISDICTION

The jurisdiction of this court to consider this matter is admitted, in so far as statutory authority is concerned, but respondent submits that the proceeding does not in fact present a federal question.

SUMMARY OF ARGUMENT

The only questions which petitioner seeks to have this court adjudicate relate to 12 instructions given and refused by the trial judge. The Supreme Court of the State of California considered all of these specifications and found nothing in the ruling of the trial court which would justify a reversal of the judgment based on the verdict of the jury. (R. 106.) The fifth and seventh specifications of error and the eighth and ninth specifications of error are all based upon the instructions of the court relating to the petitioner's duty to furnish the respondent with a reasonably safe place to work under all the circumstances of the business, and the court's instruction that they must consider not one element alone of the place of work, but must consider the whole situation at the time of the accident; which instructions petitioner contends permitted the jury to find that leaving the hold open was negligence; and that the court erred in refusing to give his proposed instructions to the effect that it was not negligence for the petitioner to leave the hold open. But the court did not instruct the jury as petitioner contends, to consider the open hold as negligence nor even to consider it as a part of respondent's place to work, but left it to the jury to determine what constituted the place to work. All of the specifications regarding the failure to instruct the jury that leaving the hold open was not negligence may be disposed of by the statement that the requested instructions were not proper statements of the law and were not consistent with the facts of the case, and by the admission that generally speaking, under ordinary circumstances, when a vessel is in port and is actually loading or discharging cargo from the hold, that leaving the hold open is not necessarily negligence. But it is not solely a question of law, and

the rule is that whether or not it is negligence, depends upon the particular circumstances existing in a particular case. It appears very clearly in the instant case that leaving the hold open when it was not being used for loading or discharging cargo at all, and when the evidence was that it was customary to close the hold under the particular circumstances existing here and respondent was ordered to work above it under protest, and it could have been closed in ten minutes and the respondent by reason of its being open fell into the hold an additional distance of about twelve feet over the distance he would otherwise have fallen, it was clearly negligence. The specified instructions do not present to this court a question of law, but purely a question of fact.

As to the third specification of error; this relates to the refusal of two instructions concerning an alleged choice of methods of work. Counsel does not attempt to justify them in their form as presented. Both instructions conclude that if the jury should find against respondent under those instructions that respondent could not recover. But it is established that if there was sufficient evidence that the respondent was performing the detail of the work in an unsafe way when there was a safe way readily and plainly available, that this would at the most be contributory negligence and not assumption of risk, which would not bar respondent from a recovery. Furthermore, neither instruction was a correct statement of the law in other respects. Both instructions were attempted to be based upon certain detailed facts relating to the work, and they invaded the province of the jury and were argumentative. They do not mention the defense of assumption of risk.

As to the fourth specification of error; the refusal to give a certain instruction concerning alleged disobedience

of instructions given for respondent's safety, this instruction was also based on details of work. It concluded, that if the jury should find in favor of petitioner thereon that respondent could not recover at all. But such disobedience, if any, would be contributory negligence and not assumption of risk. It was unquestionably based on certain testimony given by the captain that he picked out the respondent, a seaman of eight years' experience on steam lumber schooners from among the other seven seamen working around the hold, to give him certain specific instructions as to how to put a sling around a slingload; saying that the reason he gave the instructions was that he was afraid that respondent would "fall in the hold". But the testimony, including that of the captain himself was to the effect that the first mate was in charge of unloading operations; that at the time the captain allegedly spoke to the respondent that the men were not even getting out the slingloads next to the open hold but were working up on top of the heavy timbers, a place of safety, although the captain testified that they were working on the slingloads. Considering other facts brought out, the testimony of the captain on this phase was entirely discredited. The respondent expressly denied that any such conversation took place, and testified that the captain was not even on deck at the time that he fell. In view of the verdict of the jury it must be deemed that they resolved the conflict, if there could be any real conflict, in favor of the respondent, and hence in any event the petitioner could not have been injured by the refusal to give any such instruction, if otherwise legally proper.

As to the first and second specifications of error which petitioner's counsel states present the "vital issue in this case", they are based entirely on the court's refusal to

give one very general instruction on assumption of risk and another instruction based upon some attempted distinction between a seaman attached to a coastwise vessel, as was respondent; and another seaman. Furthermore, the second instruction was based upon a fact which the jury by its general verdict found against the respondent, to-wit, that in order to find in favor of petitioner under said instruction, the jury would have had to find that the injuries respondent received were caused by a danger which was "ordinarily incident to the business of carrying deck loads of lumber on ships when that business is being conducted in a manner as prudent and careful as such a business can be carried on under all the circumstances". Whereas, the undisputed testimony was that the danger was not ordinarily incident to the business of carrying deckloads but occurred for the first time, and that the business was not being conducted in a manner as prudent and careful as the business could be carried on, for the undisputed evidence was that it was being carried on in a most unusual manner, landing slingloads in a high pile right next to the hatch coaming and leaving the hatch coaming open, when it was customary to pile the lumber piece by piece over the entire deck with lath binders between every twelve inches of cut lumber and every three or four feet apart, and that it was not customary to put such slingloads in the narrow place at all, and that it was customary to leave a space so seamen could walk around the hatch coaming on the deck, and that it was customary to close the hold under the circumstances. The jury specifically found by its general verdict that the petitioner negligently failed to furnish the respondent with a reasonably safe place to work. Hence the jury found against petitioner on the second in-

struction, and petitioner could not well have been injured by the refusal of the trial court to give it.

As to the first instruction it was entirely too general, and even if the defense of assumption of risk had been available, which it was not under the circumstances of the case, the proposed instruction would not have given the jury an adequate understanding of the defense.

Hence it is contended that the refusal of the trial court to give any of the specific instructions which petitioner proposed, did not deprive the petitioner of a right, privilege or immunity under a statute of the United States, to which he was entitled. Petitioner does not set forth in the record the entire charge of the trial court, as we understand should be done to have errors in instructions considered.

The case went to the jury on the ultimate question as to whether or not the petitioner had negligently failed to furnish the respondent with a reasonably safe place to work under all the circumstances of the business. Unquestionably the jury was properly and fairly instructed on this issue, and as said by the Supreme Court of California in its judgment in this case, "The submission of the case to the jury on the issue considered by it, was as favorable as the defendant could expect under the authorities cited herein". (R. 106.) It is not a novel procedure to send a seamen's case to the jury on the ultimate issue of safe place to work. It is as fair to the ship operator as it is to the seaman.

Petitioner's counsel in his brief finds no fault with a single authority cited by the Supreme Court of the State of California in support of its decision. Petitioner's main contention seems to be that he is entitled to have this

court determine the case anew for failure to give his instructions on assumption of risk. Only three of the instructions, those two mentioned in the first specification and the one relating to the assumption of risk of the open hold, XIX (R. 98) make any mention of the doctrine of assumption of risk. The third could not be given as the question of negligence in leaving a hold open depends entirely on the circumstances of the case. It was otherwise objectionable. The second instruction, it has been noticed was certainly not proper to be given, leaving as the only possibility the first instruction on assumption of risk, which was entirely too general to inform the jury regarding the defense.

The opinion of the Supreme Court of the State of California does not deny that the defense of assumption of risk is available in actions under the Jones Act, but is based upon the assumption that it is, generally speaking, an available defense. But obviously it is not always a defense, and there are several exceptive circumstances under which it is not available at all as against a seaman suing under the Jones Act, and several of these exceptions are admittedly present in this case. It seems to be settled that a seaman does not assume the risk of his employer's negligence in failing to provide him with a reasonably safe place to work. Practically the same rule obtained under the old rules of master and servant under the common law. Since the case went to the jury upon fair instructions on the issue of safe place to work and the jury found against petitioner on this issue, he could not have been damaged by the refusal to give any instruction on assumption of risk, as it was not applicable. Petitioner's counsel admitted in their opening brief before the state appellate court that if the trial court had

properly instructed the jury on negligence that the respondent would probably be entitled to have the case sent to the jury on the issue of safe place to work. The Supreme Court of California bases its decision principally upon authorities of the federal courts holding as above and petitioner does not contend that those authorities do not so hold.

A seaman does not assume the risk when he is injured while performing duties under orders. It was an undisputed fact in this case that respondent's working partner protested in respondent's presence and hearing against the hold being left open, when they were ordered by the mate to unload the slingloads of cut lumber next to and high above the open hold, but that the mate ordered them to proceed with the work stating that they could get the lumber out without closing the hold. The Supreme Court of California adverts to the fact that the respondent was ordered to work with the hatch uncovered. Petitioner's counsel expressly admits this principle in his own proposed instruction to the jury number I (R. 92), the refusal to give which however, petitioner has now abandoned as a specification of error upon which he relies. But in that instruction petitioner asked the court to instruct the jury that the plaintiff was a seaman and that it was the general rule that seamen do not assume the risks of their employment when they are acting in obedience to orders; the only qualification sought to be put upon that admitted rule being a request to the court to instruct the jury that respondent might have been excepted from that rule in case they should find that he did not have the status of a "seaman". In petitioner's brief, his counsel attempts to make a vital distinction between a seaman generally speaking and a seaman such as was the

respondent. There is no such distinction, and could not well be. Counsel cites two cases involving; one, an "extra" fireman employed on different tugs, and the other a deck-hand on a tug, which employees were not attached even to any certain tug but worked in the harbor in the day time on a tug and lived at home at night. In those two cases decided by the Circuit Court of Appeals of the Second Circuit the court held that on account of the nature of the plaintiffs' employment that the analogy of land workers was more persuasive and permitted the application of the defense of assumption of risk against the employee, with its full rigor. But as to seamen as such, the court re-iterates the principle referred to above. The Supreme Court of the State of California considers those two cases and decides, it is contended, quite properly, that those cases could not apply to the respondent, as he was attached to this particular vessel and had signed up for a certain voyage out on the ocean, and lived upon the vessel and had the status of a seaman and was entitled to the same construction of the Jones Act as the general class of seamen. In view of petitioner's own admission that the defense of assumption of risk is not available where the seaman is working under orders, he waived any injury, if such there was, by the court's refusal to give his general instruction, or any instruction on assumption of risk. It has been held in several cases to be reversible error to give any instructions on assumption of risk under similar circumstances.

Petitioner only contends that he was injured by the refusal to give his instructions on assumption of risk as to ordinary and obvious hazards. But as noted the undisputed evidence was that the hazards encountered by respondent whereby he was injured were not ordinary haz-

ards of the employment. The jury found that it was not a reasonably safe place to work, and its general verdict implied a finding that the unloading operations were being carried on in a negligent manner. An employee does not assume the risks of dangers of his employment which are unusual and with which he is confronted for the first time. He does not assume the risk of his employment arising from the unusual and negligent manner in which the work is being carried on. The risk arose from the negligence of the first mate in landing the lumber in such a place without hand-stowing and compelling the seamen to work thereon without closing the hold and hence the negligence was that of a fellow servant. A seaman under the Jones Act does not assume the risk of his employment caused by the negligence of a fellow servant. Counsel in stating the facts, in several instances states as proven facts, the testimony only of his own witness, which was discredited, and was disputed by respondent's witnesses and which conflict must be deemed to have been resolved in favor of the respondent. These questions of fact are not properly presented to this court, as this court is only concerned with questions of law. The propriety of giving the proposed instructions depends essentially upon an appreciation of the evidence. The trial court, who had all the facts before it, concluded that the proposed instructions were not proper under the evidence. The Supreme Court of the State of California has also concluded that they were not proper under the evidence. This court has heretofore held that under such circumstances they would not review the judgment.

The ruling of the trial court refusing the instructions and the judgment of the Supreme Court concluding that there was no error in refusing or giving instructions,

could be based squarely upon the principles and rulings of the common law. And where this is the case it is believed that this court will not review the judgment.

The proceeding does not present a novel question or one that has not heretofore been ruled upon by this court. Almost precisely the same questions were presented to this court in *Panama Ry. Co.* v. *Johnson*, 264 U. S. 375, 393, and in that case this court concluded that considering the state of the evidence, the proposed instructions on assumption of risk would not have conveyed a right understanding of the subject and might well have proved misleading, and held that their refusal was not error.

There is only t[illegible] one general instruction which petitioner specifies, which could possibly be given on assumption of risk if the defense had been available and that is too general to give any adequate understanding of the subject. The petitioner cannot show reversible error unless he can point to specific instructions which were framed properly to be given the jury and which were applicable under the facts, and which were legally correct. The Supreme Court of California has decided the case in accord with applicable decisions of this court and not contrary thereto. The case in reality involves very ordinary principles of the law of negligence as presented in an ordinary case in personal injury actions. The question as to whether the specific instructions should have been given in this case, it is believed, is not such a matter of gravity and general importance as to require this court to review the judgment of the Supreme Court of the State of California.

In the event that this court should grant a Petition for Writ of Certiorari and review the judgment of the Su-

preme Court of the State of California and compel this seaman to go back to the trial court and re-litigate his cause of action for damages for personal injuries with the consequent additional heavy expense and great delay, there would remain in any event only one general instruction on assumption of risk which could be given the jury at all upon that subject, and which would not enlighten them. Furthermore under the facts of this particular case, even if such an instruction were given, it is apparent that it would not be likely to cause a verdict for the petitioner.

ARGUMENT

Reply to Petitioner's First and Second Specifications of Error

"The refusal to Give any Instruction at All Upon Assumption of the Risk."

The real question is not whether the trial court refused to give any instruction at all upon assumption of risk, but whether the petitioner was denied a material, right, privilege, or immunity under a statute of the United States to his prejudice, by the refusal of the trial court under the circumstances of this particular case, to give any specific instruction allegedly bearing on the defense of assumption of risk, which the petitioner proposed, and which he can justify as being a correct statement of the law, and which would probably cause a verdict for defendant, if the judgment should now be reversed and the cause sent back to be tried anew, and that specific instruction given.

It is submitted that counsel for petitioner does not correctly paraphrase the holding of the Supreme Court of the State of California. (There is no *holding* of the District Court of Appeal.) Counsel says that the opinion of the Supreme Court of California "holds squarely and without supporting authority that when the issue of negligence in actions under the Jones Act is presented to the jury the trial court may, notwithstanding the evidence upon the question, withdraw the issue of assumption of ordinary risks of the employment from the jury's consideration". The opinion speaks for itself. In the first place the opinion of the Supreme Court is based directly on the hypothesis that the respondent here did assume the risks ordinarily incident to his employment (R. 104, Fol. 154). As far as its criticized holding is concerned, it seems that it should be stated in the language of the Supreme Court, which is as follows:

> (R. 104.) "The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision.
>
> It has become well recognized, both before and since the incorporation into the Jones Act of the Federal Employers' Liability Act, that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are

stated in the cases recognizing the exception. (Lafourche Packet Co. vs. Henderson, 94 Fed. 871; The Colusa, 248 Fed, 21; Cricket S. S. Co. vs. Parry, 263 Fed. 523; Ziegler v. Alaska Portland Packers, Assn., 296 Pac. 38; LeJeune v. General Pet. Corp., 128 Cal. App. 404; 56 Corp. Jur. 1198, et seq., McGeorge v. Charles Nelson Co., 107 Cal. App. 148.) It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. (Seaboard Air Line v. Horton, supra; States S. S. Co. v. Berglann, supra; Ziegler v. Alaska Portland Packers Assn., supra; The Kongosan Maru, 282 Fed. 666; Engfors v. Nelson S. S. Co., supra.) The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. (Cincinnati, M. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76, 81.)" (R. 105.)

* * * * * *

(R. 105.) "The record supplies sufficient evidence to go to the jury on that issue and to support its implied finding thereon. Upon the record presented the submission to the jury of the instructions requested would be the practical equivalent of directing a verdict for the defendant. The facts do not present such a case as, without question, entitled the defendant to the instructions on the question of assumption of risk, and the withholding of instruction on that question, if error, was not prejudicial to him.

There was no failure to instruct the jury on the defendant's theory of the case. The submission of the case to the jury on the issue considered by it, was as favorable as the defendant could expect under the authorities herein cited.

We have examined the other specifications of error with reference to the refusal to give certain requested

> instructions and to the admission and exclusion of certain evidence, and find nothing in the rulings of the trial court which would justify a reversal."

It is submitted that this actual holding of the Supreme Court does not furnish sufficient premise as a basis for counsel's further argument.

Respondent submits that it is quite noteworthy that petitioner's counsel does not criticize a single case cited by the Supreme Court in support of its opinion, but states that its holding is "*without* supporting authority", and, in support of his argument in his First and Second Specifications of Error, he cites cases in the main, arising, under the Federal Employers' Liability Act; railroad cases involving land workers, and *does not cite a single case involving a "seaman" under the Jones Act.*

Cases Under the Federal Employer's Liability Act or Land Cases Involving the Old Rules of Master and Servant Do Not Furnish a Rule of Decision on the Defense of Assumption of Risk when the Defense Is Sought to Be Set Up Against a Seaman Suing Under the Jones Act.

This court, in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375, settles this distinction beyond all question, when this court says therein:

> "This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. *Jamison* v. *Encarnacion,* 281 U. S. 635. * * *
>
> Approaching the decision of this case in a like spirit of liberality, we put aside many of the refine-

ments of construction that a different spirit might approve. * * *

We are warned, however, that in giving this content to the statute we are omitting to give heed to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted. The Employers' Liability Act for the protection of the employees of common carriers by railroad gives a remedy to such employees "for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," or by reason of any negligent defect in its roadbed or equipment. 35 Stat. 65, Sec. 1; 45 U. S. Code, Sec. 51. True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. * * * We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Robertson* v. *Baldwin*, 165 U. S. 275, 287. Another court has said: "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited." *Scarff* v. *Metcalf*, 107 N. Y. 211, 215; 13 N. E. 796. * * *

The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs. Cf. *Murray* v. *Chicago & N. W. Ry. Co.*

62 Fed. 24, 31; *Ward* v. *Erie R. Co.*, 230, 234; 129 N. E. 886, *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 343. Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail."

And in *Bainbridge* v. *Merchants & Miners Co.*, 287 U. S. 278, 281, this court says:

"A more serious question is whether suits under the Jones Act may be regarded as suits by seamen "for wages or salvage" or "to enforce laws made for their health and safety". Such a suit is not for wages or salvage. Is it to enforce a law made for the health or safety of seamen? In the *Bennington* (D. C.) 10 F. (2d) 799, the question was answered in the negative. In *Grant* v. *United States Shipping Bd. Emergency Fleet Corp.* (C. C. A. 2d) 24 F. (2d) 812, it was answered in the affirmative. The court in the latter case rejected the construction put upon the provision by the decision in The Bennington as too narrow and not in accord with the liberality Congress intended toward seamen, holding that the Jones Act, being an addition to the Seaman's Act, was intended to be consistent with the spirit of that Legislation, which was directed to promote the welfare of American seamen. We agree with that view. The Jones Act is an amendment to Section 20 of the Seamen's Act. The Jones Act has the effect of bringing into the maritime law, for the benefit of

seamen, all appropriate statutes relating to employers' liability for the personal injury or death of railway employees. Both acts are to be treated as part of the maritime law. *Panama R. Co.* v. *Johnson,* 264 *U. S.* 375, 389, 68 *L. Ed.* 748, 753, 44 *S. Ct.* 391. Seamen have always been regarded as wards of the admiralty and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. *Benedict, Admiralty 4th ed., Sections* 182, 603. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. *Robertson* v. *Baldwin,* 165 *U. S.* 275, 287, 41 L. Ed. 715, 719, 17 *S. Ct.* 326. In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed. The Seamen's Act, which includes the Jones Act by amendment, is entitled in part "An act to promote the welfare of American seamen * * * and to promote safety at sea." (March 4, 1915) *Chap.* 153, 38 *Stat. at L.* 1164, *U. S. C. title* 46, *Sec.* 569. It requires little if any aid from the doctrine of liberal construction to enable us to say that the present suit is one to enforce a law made for the safety of seamen. Petitioner will not be required to prepay or make deposit to secure fees or costs, and the Clerk will be directed to refund the deposit already made."

In *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619 (D. C. W. D. Wash.), plaintiff, a watchman, member of a crew of a vessel, sued for damages for injuries sustained by him on the vessel operated by defendant, which injuries were caused by plaintiff tripping and falling over an iron bar holding down a tarpaulin upon a hatch cover which bar was, negligently, not fastened in place and that the deck was insufficiently lighted. The court says:

"It therefore follows that an injured seaman must

be held to have assumed the risk of injury from any and all those dangers ordinarily and naturally incident to the service in which he engages; but it cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk, as the same has been developed under the law of railway carriage."

* * * * * *

(4) The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. *Cricket S. S. Co.* v. *Parry* (*C. C. A.*) 263 *Fed.* 523, *at* 525 *and* 526, certiorari denied *Cricket Steamship Co.* v. *Parry*, 252 *U. S.* 580, 40 *Sup. Ct.* 345, 64 *L. Ed.* 726. The danger of injury because of negligence, if any, in failing to provide means to fasten the iron bar in place, the plaintiff would not assume. *Cricket S. S. Co.* v. *Parry* (*C. C. A.*) 263 *Fed.* 523, *supra*. If there was no negligence in the foregoing respect, and the iron bar was either negligently placed in the position described, or negligently permitted to get and remain in such position, which negligence was that of an officer of the ship or member of the crew other than plaintiff, the plaintiff would not, without more, assume the risk of injury arising from such negligence; for the Employers' Liability Act and the La Follette Act both abolish the defense of a fellow servant's negligence."

And in *Cricket S. S. Co.* v. *Parry* (C. C. A. 2nd), 263 Fed. 523, 525, a leading case, the court says:

"(3) The defendant contends that the plaintiff cannot recover because he shipped with knowledge of the condition complained of,—two decisions of this Court are cited. We do not think them applicable because the plaintiffs were shore servants, in the

first, a longshoreman, and in the second, a railroad hand. We are considering the rights of seamen who have constituted from early times a peculiar class. The unusual protection extended to them is reflected in the familiar saying that they are the wards of the admiralty. As to the second proposition, shipowners cannot justify furnishing them with defective and dangerous appliances on the ground that they knew of it * * * This seems to us in accordance with the view that the courts have taken throughout as to the relation of master and seaman."

And in *The Colusa*, 248 Fed. 21 (C. C. A. 9th), where a seaman was injured on account of a defective turnbuckle, the court says:

"(5) It is contended that the appellee assumed the risk of the injury, but the ordinary rule which applies to the assumption of risk by a workman is not applicable to the case of a seaman on board ship. * * * If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought at least to hold to the strictest rule of diligence and care."

In *Lafourche Packet Co.* v. *Henderson*, 94 Fed. 871 (C. C. A. 5th), after discussing some cases applying to the doctrine of assumption of risk as applied to land workers, the court says:

"Without discussing or disputing the law as declared in the authorities mentioned, we are of opinion that it is not applicable to the case in hand. There must be a different rule as to the risks assumed by seamen on board ship from the rule as to the risks assumed by servants and other employees on land."

In *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148,

that court quotes the above noted distinction from *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621, and then adds:

> "On the subject before us it is not claimed that the statutes above mentioned repealed the rules of the maritime law. It could not reasonably be so claimed because it has been directly adjudicated that the statutes referred to had the general effect of extending the rights of seamen who might suffer injury. (*Panama R. Co.* v. *Johnson,* 264 U. S. 375.) Before the enactment of the statutes above mentioned the liability to a seaman was quite well digested in what is said in 35 Cyc., at page 1244. That liability has been broadened. (Panama R. Co. v. Johnson, 264 U. S. 375, 391.)"

In 56 *Corpus Juris* 1099, Sec. 682, that work states the distinction in the following language:

> "The fact that the Jones Act makes the Federal Employers' Liability Act applicable to seamen does not mean that the doctrine of assumption of risk shall have an identical definition under both acts.
>
> On the contrary, assumption of risk as applied to seamen under the Jones Act should be defined differently from such doctrine as applied to railroad employees under the Employers' Liability Act. (Citing *States S. S. Co.* v. *Berglann,* 41 Fed. (2nd) 456; *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621; *McGeorge* v. *Charles Nelson Co.,* 107 Cal. App. 148.) And in this connection it has been pointed out that under the two acts the maritime, rather than the common, law controls with respect to assumption of risk by seamen."

Accordingly, the Supreme Court of California in its opinion, in the instant case, says: (R. 105.)

> "It has become well recognized, both before and since the incorporation into the Jones Act of the Federal Employers' Liability Act, that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are stated in the cases recognizing the exception. (*Lafourche Packet Co. vs. Henderson*, 94 Fed. 871; *The Colusa*, 248 Fed. 21; *Cricket S. S. Co. vs. Parry*, 263 Fed. 523; *Ziegler* v. *Alaska Portland Packers' Assn.*, 296 Pac. 38; *LeJeune* v. *General Pet. Corp.*, 128 Cal. App. 404; 56 *Corp. Jur.* 1198, et seq.; *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148)."

Counsel for petitioner refers to *The Iroquois*, 194 U. S. 240. But that case was a libel against the ship in admiralty to recover damages for the failure of a master to provide suitable surgical treatment and care for the libelant, who had suffered injury by a fall from the main yard to the deck of the vessel. The risk referred to by this court in the quotation from the case that counsel sets forth, was not a risk of injuries from any unsafe place to work, or while working in any certain place under orders, but was a risk only of not being able to procure medical attention promptly on account of the distance of the vessel from a port where the services of a competent physician could be obtained, and the last mentioned was the only point in the case. This court affirmed the decree in favor of the seaman.

Whatever May Be the Rule Under the Federal Employers' Liability Act or Under the Old Law of Master and Servant, the Defense of Assumption of Risk Is Not Available at All Against a Seaman Suing Under the Jones Act in the Following Circumstances:

A. A seaman never assumes the risk of negligent acts of those in charge of the ship in failing to provide him with a reasonably safe place to work.

In *States Steamship* v. *Berglann* (C. C. A. 9th) 41 Fed. (2d) 456, Berglann, a seaman, brought his action under the Jones Act for personal injuries. The court says:

> "(3, 4) In performing such tasks a seaman assumes all of the ordinary risks of his employment, but, because he cannot quit the ship nor control the actions or orders of the ship's officers, he does not assume the risks of negligent acts of those in charge of the ship whereby his place of work as a seaman is made unsafe; nor does he assume the risk of failure of those in charge of the ship to take such precautions as the perils of the sea may render necessary and reasonable. *Panama R. Co.* v. *Johnson* (C. C. A.) 289 Fed. 964; *Zinnel* v. *United States Shipping Board, etc.* (C. C. A.) 10 F. (2d) 47; *The Colusa* (C. C. A.) 248 Fed. 21."

In *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621 (D. C. W. D. Wash.), the court says:

> "(4) The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. *Cricket S.*

S. Co. v. *Parry* (C. C. A.) 263 Fed. 523 at 525 and 526, certiorari denied *Cricket Steamship Co.* v. *Parry*, 252 U. S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726."

In *Zinnell* v. *U. S. S. B. E. F. Corp.* (C. C. A. 2nd), 10 Fed. (2nd) 47, Zinnell's administrator sued under the Jones Act for damages for negligence alleged to be an unseaworthy vessel, and that the defendant did not provid the intestate with a reasonably safe place to work. The answer pleaded assumption of risk as a defense. The court said:

> "We therefore decline to engage in any discussion as to seaworthiness, beyond, indeed, observing that the term has itself the most relative meaning. (Citing ing cases.) All we need, and do, hold is that under the law of master and servant, as now in force by statute, the circumstances were such as would allow the jury to find that there was no rope, and that its absence made the intestate's place of work unsafe. * * *
>
> (6) As to the assumption of risk, on which we all agree, we need do no more than refer to our own decisions in *Cricket S. S. Co.* v. *Parry* (C. C. A.) 263 Fed. 523, and *Panama R. R. Co.* v. *Johnson*, (C. C. A.) 289 Fed. 964, and to the law in other circuits, *Lafourche Packet Co.* v. *Henderson*, 94 Fed. 871, 36 C. C. A. 519 (C. C. A. 5th), and *The Colusa*, 248 F. 21, 160 C. C. A. 161 (C. C. A. 9th)."

In *Engfors* v. *Nelson Steamship Co.* 131 Ore. 108, 115, plaintiff, a seaman, sued under the Jones Act for damages and personal injuries sustained on his vessel, a steam schooner, plying along the Pacific Coast, while it was moored to a dock at Portland, Oregon, taking on a cargo of cut lumber. He had been ordered to descend

into the hold to assist there in placing lumber as it was delivered. The court says:

> "Under the Federal Employers' Liability Act (45 USCA, secs. 51-59), when the injury is caused by the failure of the master to provide a safe place to work or safe appliances, the defense of assumption of risk cannot be made."

In *Wychgel* v. *States Steamship Company,* 135 Ore. 475, 495, the plaintiff, a seaman, sued under the Jones Act for injuries sustained by falling through a hatchway while his steamship was fastened to the dock in China. The negligence alleged was that the hatches placed over the hold had been improperly placed and were in an unsafe and dangerous position and tipped or gave way under his weight and precipitated him into the hold. The Supreme Court of Oregon considers the refusal of the trial court to give certain instructions on assumption of risk, proposed by respondent, and upholds the trial court's refusal, saying:

> "In the case of *Engfors* v. *Nelson Steamship Co.,* 131 Ore. 108 (280 P. 337), under the Federal Employers' Liability Act, Mr. Chief Justice COSHOW writing the opinion, we find:
>
> > 'Under the Federal Employers' Liability Act when the injury is caused by the failure of the master to provide a safe place to work or safe appliances, the defense of assumption of risk can not be made.' "

The defendant steamship company petitioned this court for Writ of Certiorari in this case, *States Steamship Company* v. *Wychgel,* which was denied on October 12, 1931.

In *Ziegler* v. *Alaska Portland Packers' Assn.*, 135 Ore. 359, 368, the plaintiff, a seaman, employed on a coastwise vessel as a cook was traversing a deck load of timbers constituting a part of the deck load, when he stumbled upon an upturned timber and was thrown to the floor. The court says:

> "(4) We come now to the contention that the court's instructions upon the defense of assumption of risk was erroneous.
>
> * * * * * *
>
> Since this action is founded upon a charge that the injury occurred upon the high seas due to a defectively stowed cargo, we believe that the instruction is not subject to any criticism from the defendant. *Howarth* v. *United States Shipping Board* (C. C. A.) 24 F. (2d) 374; *Zinnel* v. *United States Shipping Board* (C. C. A.) 10 F. (2d) 47, and *United States Shipping Board* v. *O'Shea*, 55 App. D. C. 300, 5 F. (2d) 123. See, also, *Engfors* v. *Nelson Steamship Co.*, 131 Ore., 108, 280 P. 337, especially the statement therein that under the Federal Employers' Act the employee never assumes a risk caused by the master's failure to provide a safe place for working."

And the rule is stated in 56 *Corpus Juris*. 1100 as follows:

> "The employer cannot escape responsibility for damage to a seaman arising from breach of his duty to furnish a seaworthy ship or safe place to work, on the plea that the seaman assumed the risk of injury arising therefrom. (Citing *Southern Ry Co.* v. *Hermans*, 44 Fed. (2nd) 366.)"

These authorities were all cited in the state courts, and consequently the Supreme Court of California in the instant case, while not basing its decision entirely on that theory, says:

> "It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. (*Seaboard Air Line* v. *Horton,* supra; *States S. S. Co.* v. *Berglann,* supra; *Ziegler* v. *Alaska Portland Packers' Assn.,* supra; *The Kongosan Maru,* 282 Fed. 666; *Engfors* v. *Nelson S. S. Co.,* supra.) The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. (*Cincinnati, M. O. & T. P. Ry Co.,* v. *Hall,* 243 Fed. 76, 81.)" (R. 105.)

Counsel does not attempt to controvert the force of these authorities. Since the case went to the jury on the issue of whether or not the petitioner had fulfilled his duty of furnishing to respondent a reasonably safe place to work, under all the circumstances of the business, and the jury found by its general verdict that he had not, then the petitioner could not have been injured by the refusal of the trial court to give any of his proposed instructions on assumption of risk, even if in proper form, for the foregoing reason that a seaman does not assume the risk of his employer's negligence in failing to provide a reasonably safe place to work.

It is not a novel procedure to send a seaman's case to the jury on the general issue of safe place to work.

In *The Kingsholm,* 1928 A. M. C. 204; 246 N. Y. 300, the following appears:

> "Cardozo, C. J.—The case went to the jury to see whether there had been a negligent failure by the master to make the place of work safe. * * *"

Also the recent case of *Hanson* v. *Luckenbach Steamship Co.,* 1933 A. M. C. 764 (C. C. A. 2d), was sent to

the jury on the issue as to whether or not the employer had provided his seaman with a reasonably safe place to work.

In *Cincinnati, N. O. & T. P. Ry. Co.* v. *Hall* (C. C. A. 6th) 243 Fed. 76 the court says that the questions of assumption of risk and inspection and warning only reflect "upon the broader and ultimate question immediately involved in the charge of the existence of a duty by defendant to exercise reasonable care to provide for its employees a safe place in which to work."

In fact, petitioner's counsel in his brief in the state court admitted that if the court had given proper instructions as to each act of negligence relied upon, "* * * * the plaintiff would, perhaps, be entitled to have the case sent to the jury upon the issue of safe place to work." (Affidavit of A. Don Duncan—Appendix.)

B. A seaman does not assume the risk involved in obeying orders aboard ship, even though the danger of working in the place he is ordered to work, might be obvious:

The rule is stated in 56 C. J. 1101 as follows:

> "Since a seaman is under the duty of obeying orders ordinarily he does not assume any risk involved in doing as he is ordered. (Citing *U. S. S. B. E. F. Corp* v. *O'Shea*, 5 Fed. (2nd) 123; *Becker S. S. Co.* v. *Snyder*, 31 O. App. 379; *Masjulis* v. *U. S. S. B. E. F. Corp.*, 31 Fed. (2nd) 284, 285; *Panama R. R. Co.* v. *Johnson*, 289 Fed. 964 (affirmed), 264 U. S. 375; *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148.)"

In *Lejeune* v. *General Petroleum Corporation of California* (*on rehearing*), 128 Cal. App. 404, 414, the plaintiff, a member of the crew of a coast-wise vessel, sued under

the Jones Act for injuries sustained by him while weighing anchor off a small port in California, when thrown by a sudden reversal of the anchor chain when ordered to work in the chain locker. The court says:

> "He is bound to obey, and there is no assumption of risk, even though the danger may have been obvious to him. *United States* v. *Boykin,* 49 Fed. (2d) 762; *Panama R. Co.* v. *Johnson,* 289 Fed. 964; *Wychgel* v. *States S. S. Co.,* (Ore.) 296 Pac. 863, 135 Ore. 475."

In *Holm* v. *Cities Service Transportation Company,* (C. C. A. 2d) 60 Fed. (2d) 721, the court says:

> "Where a seaman is injured when acting under orders, he does not assume the risk. *Panama R. R. Co.* v. *Johnson,* 1923 A. M. C. 798, 289 Fed. 964; *Masjulis* v. *Shipping Board* (C. C. A. 2d) 31 Fed. (2d) 284."

In *Lafourche Packet Co.* v. *Henderson,* 94 Fed. 871, 876, the plaintiff was a member of the crew of a steamboat running to and from New Orleans, on the lower reaches of the Mississippi. The vessel was lying moored at a plantation dock. The plaintiff who had the status of a seaman, was ordered to go into the hold to aid in storing cargo and was injured there while loading sugar barrels. The defendant claimed that he assumed the risk. The court held:

> "A seaman aboard ship is bound to perform such services as may be required of him in the line of his employment. He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe. Masters of ships exercise large powers, and they may legally compel obedience to orders. (Then quoting from another case) 'It may be, as

urged so strongly by the appellant, that the libelant received these appliances and proceeded to use them without objection; but if this be so it must be be considered that on board ship a sailor is not expected to, nor is for that matter permitted, before executing an order, to question the propriety of the order or the sufficiency of the materials furnished.' ''

Also in *Masjulis* v. *U. S. S. B. Corp.* (C. C. A. 2d) 31 Fed. (2d) 284, the court gave instructions on assumption of risk similar in effect to those petitioner requested here. The plaintiff was a seaman and was injured while his vessel was at the dock. There was a verdict for defendants and plaintiff appealed, assigning as the only error, the instructions given on assumption of risk. The court says:

"Since the plaintiff was using the rope under orders, it was error to submit the question of assumption of risk to the jury. *Cricket Steamship Co.* v. *Parry* (C. C. A.) 263 F. 523; *Panama Railroad Co.* v. *Johnson* (C. C. A.) 289 F. 964.

* * * * * *

The charge given put the plaintiff where he would be at the disadvantage of having to decide between assuming the risk of injury caused by defective appliances, due to the negligence of his superiors, or of assumption of risk of disobedience to the order of his superior officer, with whatever consequences that would entail, and in either event of assuming the risk of his choice. This in effect gave to the defendants a distinct defense to the action, to which under the law they were not entitled."

And in the case of *Hanson* v. *Luckenbach S. S. Co. Inc.*, (C. C. A. 2nd) 1933 A. M. C. 764, the court says:

"Being a seaman, it is well settled that the plaintiff did not assume any risks involved in obeying or-

ders. (*Cricket S. S. Co.* v. *Parry*, 263 Fed. 523, C. C. A. 2nd; *Panama R. R. Co.* v. *Johnson*, 1923 A. M. C. 798, C. C. A. 2nd; *Zinnell* v. *U. S. S. B. E. F. Corp.*, supra; *Holm* v. *City Service Co.*, C. C. A. 2nd, 1932 A. M. C. 1188, 60 Fed. (2nd) 721.)"

In the instant case, as pointed out in the statement of facts it was undisputed that the first mate had ordered respondent and his working partner to proceed with the unloading of the landed slingloads, stating that it was not necessary to close the hold. (R. 32, 113, 125.) The Supreme Court of California mentions such testimony in its statement of the facts of this case. (R. 103.) Since, as noted, this testimony stands without any contradiction whatsoever by petitioner's witnesses, the petitioner could not have been materially injured, or denied, to his material prejudice, any right, privilege or immunity under a statute of the United States by the failure of the trial court to give any specific instruction on assumption of risk, if in proper form.

In fact in *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148, 150, the trial court gave several instructions on assumption of risk very similar to a portion of several of the instructions which petitioner complains were not given in the instant case, and the District Court of Appeal of California said:

"(1) Prior to the enactment of the statutes above mentioned it had become the settled law that when it was the duty of a servant to obey an order he was entitled to indemnity against the risk and this rule was especially applicable to seamen. (1 Shearman and Redfield on Negligence, secs. 207h and 211a.)

* * * * * * *

In doing what he did, as stated above, there was

some evidence that the plaintiff was acting under orders. In obeying orders he did not assume the risk of using an unfit tool. (*The Osceola*, 189 U. S. 158, 175 *Silveira* v. *Iverson*, 128 Cal. 187, 192; *U. S. Shipping Board Emergency Fleet Corp.* v. *O'Shea*, 5 Fed. (2d) 123, 125; *Masjulis* v. *U. S. Shipping Board*, 31 Fed. (2d) 284, 285; *The Richelieu*, 27 Fed. (2d) 960, 972.) (3) The trial court gave several instructions which were in violation of the rules above stated. It will do no good to set all of them forth.

* * * * * * *

Such instructions were not applicable to an action by a seaman under the facts of the instant case."

And for giving such instructions on assumption of risk, when there was some evidence that the seaman was acting under orders, the District Court of Appeal reversed the judgment. A Petition for Transfer to the Supreme Court of California for hearing and determination was denied September 4, 1930.

In petitioner's proposed instruction No. I which he has included in the record here, (R. 92) but which he does not refer to now in his brief as being erroneously refused, he asked the court to instruct the jury:

" * * * * *

The plaintiff in this case is a seaman, and it is the general rule that seamen do not assume the risks of their employment when they are acting in obedience to orders.

* * * * * *

(R. 93, Fol. 138.) The defendants in this case have interposed the defense that the plaintiff was injured by a risk which he assumed, and whether this defense is available to them or not depends upon your finding of what the status of the plaintiff was when

the command to unload was given."

It is submitted that this proposed instruction, while not otherwise proper to be given the jury, contains a sufficient admission obviating the giving of any instructions on assumption of risk in this case, and constituting a waiver of petitioner's insistence in this court that this court should reverse the judgment of the Supreme Court of California for failure of the trial court to give his proposed instructions on assumption of risk.

C. Petitioner negligently failed to furnish a reasonably safe place to work as the jury found. The immediate negligence was that of the first mate, a fellow-servant of respondent, and under the Jones Act a seaman does not assume the risk of the negligence of a fellow-servant.

The first mate was in charge of loading the vessel, (R. 62) and he was in charge of the unloading and ordered the seamen to proceed to unload the slingloads piled between the heavy timbers and the hatch coaming (R. 114, 125), and he was also the fellow-servant who refused to order the hold closed.

In *Lejeune* v. *Gen. Petroleum Corp.*, 128 Cal. App. 404, the District Court of Appeal of California, says:

> "A seaman in the performance of tasks connected with his employment does not assume the risk of negligent acts of those in charge of his ship or their failure to take reasonable precautions. (*States S. S. Co.* v. *Berglann*, 41 Fed. (2d) 456.)"

In 56 *Corpus Juris*. 100 the rule is stated to be:

> "The doctrine of assumption of risk is inapplicable where the damage was proximately caused by the

> negligence of a fellow servant (Citing *Newport News Shipbuilding Co.* v. *Watson,* 19 Fed. (2d) 832) * * *. The seaman does not assume the risk of injury from the negligence of an officer (citing *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619.) or from another member of the crew. (citing *Grimberg* case.)"

To the same effect is *Reed* v. *Gen. Director of Railroads,* 258 U. S. 92 and *Harvey* v. *Texas & Pacific R. Co.,* 166 Fed. 385, 392.

In *C. & O. Ry. Co.* v. *Proffit,* 241 U. S. 462, 468, this court in an action under the Federal Employers' Liability Act, says:

> "And as has been laid down in repeated decisions of this Court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible."—etc.

D. According to petitioner's witness this was the first time this particular hazard was ever created so far as landing the slingloads in the narrow space was concerned, and it is the general rule that an employee does not assume the risk of dangers of his employment which are unusual and with which he is confronted for the first time.

Vartnaw, the first mate, testified for the petitioner that this was the first time that he had ever landed slingloads in any such space or in fact the first time that he had failed to pile the lumber piece by piece over the entire deck with lath binders between every 12 inches of lumber (R. 134). Under such circumstances the employee does not assume the risk.

In *Devaney* v. *Atchison, etc., R. Co.*, 219 Cal. 487, 496, in an action under the Federal Employer's Liability Act where a brakeman was thrown off the top of a box-car by a violent stopping of the freight train, the court says:

> "But it is settled without question and as a matter of law that the employee does not assume the risk of being thrown off the top of a car by a negligent stop or an unusual stop of the violence indicated by the undisputed physical facts in the present case. (Citing cases.) * * *"

In *Anderson* v. *Monticello S. S. Co.*, (1916) 30 Cal. App. 296, 298, a sailor recovered damages for injuries sustained in attempting to catch a heavy line with a spike on the end which penetrated one of his eyes. The court held that he did not assume the risk for two reasons; first, the nature of its defect and danger of its use were not obvious; and second,

> "The plaintiff had never in fact been called upon to perform the particular duty which either required the use by himself, or exposed him to the danger incident to the use by others of this heaving line."

This case was of course not under the Jones Act.

E. The ledge of landed slingloads of lumber constituted means or appliances furnished by petitioner for the prosecution of further work. A seaman does not assume the risk of defective appliances.

To the effect that a similar footing for a workman, to-wit, a beam, constituted such means or appliances, is *Majors* v. *Connor*, 162 Cal. 131.

A seaman does not assume the risk of his employer's

failure to furnish him with safe means and appliances with which to work. *Panama Ry. Co.* v. *Johnson* (C. C. A. 2d), 289 Fed. 964; *Howarth* v. *U. S. S. B. E. F. Corp.*, 1928 A. M. C. 397; *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148.

In 56 *Corpus Juris*. 1100, Section 686, the rule is stated:

> "The rule of general maritime law that a seaman does not assume the risk of defective and dangerous appliances or equipment remains in full force and effect under the Jones Act. (Citing cases.)"

F. The carrying on of the unloading operations by ordering respondent to work on top of insecure landed slingloads high above an open hold was found by the jury to be unusual and negligent, that is that it was not a reasonably safe place to work. It is established that a seaman does not assume the risk arising from the unusual and negligent manner in which the work is being carried on.

In *C. & O. Ry. Co.* v. *Proffit*, 241 U. S. 462, 468, this court says:

> "To subject an employee without warning to unusual dangers not normally incident to the employment, is itself an act of negligence. * * * The request requested defendant to be acquitted if the usual method of doing the work was pursued irrespective of the question of the negligence of the yard crew in carrying it out. * * * Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method but to negligence in pursuing it."

In *Hansen* v. *U. S.*, (D. C. S. D. N. Y.), 1933 A. M. C.

472, the vessel lay at a port where the seaman was injured while loading logs, the court says:

> "Mahogany logs are generally stowed one by one in level layers. * * * The stowage did not take place in accordance with such usual custom. * * * Though the libelant (plaintiff seaman) may have assumed the risk of the employment, which in this case was very great, he did not assume the risk arising from the unusual and negligent manner in which the work was being carried on."

In *Anderson* v. *Matson Navigation Co.*, 125 Cal. App. 447, a seaman was injured apparently at a dock and sued under the Jones Act. The court says:

> "In the present case, even assuming that respondent may be said to have assumed the ordinary risks attendant upon lowering heavy objects into the hold on a line, it cannot be said that he assumed the increased risks resulting from the negligence of his fellow employees in pursuing that method. * * * Under these circumstances, the doctrine of assumption of risk was not applicable. * * * "

For the above reasons, in view of the undisputed facts in this case, and the verdict of the jury, it is submitted that it would have been prejudicial and reversible error for the trial court to give any instructions on assumption of risk, (if there had been a verdict for the defendant). As the Supreme Court of the State of California says:

> "The facts do not present such a case as, without question, entitles the defendant to the instructions on the question of assumption of risk, and the withholding of instruction on that question, if error, was not prejudicial to him." (R. 105.)

Petitioner Seeks to Draw Some Distinction Between a Seaman Such as Was the Respondent, and the General Class of Seaman. There Is No Such Distinction.

Respondent admittedly had the status of a seaman and petitioner in his own instructions asked the court to instruct the jury that respondent was a seaman. (R. 92, fol. 137, R. 94, 94, 149.)

Petitioner's counsel does not point out just what bearing penalties and forfeitures have on this case. Counsel for petitioner is unable to point to any case which draws any distinction between the rights, privileges, and obligations of a coastwise seaman as distinguished from a so-called deep-sea seaman, and there is no such distinction. This court in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367; *Bainbridge* v. *Merchants & Miners Trans. Co.,* 287 U. S. 278; and in fact every other case on the subject has considered seamen as one broad general class with certain obligations existing on the part of the master or shipowner toward the seaman, such as maintenance and cure, which are annexed by law to the relation. *Cortes* v. *Baltimore Insular Line,* supra, (p. 372). The Supreme Court of the State of California in its opinion herein considers this contention of petitioner and in reference thereto, says:

> "The appellant contends that if that defense is not available in the case of a seaman suing under the Jones Act, nevertheless the plaintiff is not a seaman but is rather in the class of longshoremen and stevedores who live on shore and are not subject to the discipline of the ship and may quit at will. This argument is predicated on the showing that the vessel was engaged only in the coastwise trade, and was

never any great distance from a port, and that the plaintiff was not under any necessity of subjecting himself to unsafe employment, but could quit at will. The cases relied upon by the defendant, however, do not indicate that the mere engagement in coastwise trade alone is sufficient to create the exception. In such cases as *Skolar* v. *Lehigh Valley R. Co.*, 60 Fed. (2d) 893, *the Scandinavia,* 156 Fed. 403 (see also *Scheffler* v. *Moran Towing & Trans. Co.*, 68 Fed. (2d) 11), the plaintiff lived on shore and otherwise was not strictly a seaman subject to orders and discipline as such. We think the rule of those cases was not intended to be extended to the case of a seaman simply because he was employed on a vessel which touched ports frequently." (R. 104.)

Counsel in his brief cites the two foregoing cases of *Skolar* v. *Lehigh Valley Ry. Co.*, 60 F. (2d) 893; and *Scheffler* v. *Moran Towing and Trans. Co.*, 1934 A. M. C. 441), (Pet. Br. 26). But it is submitted that the Supreme Court of California has properly disposed of those cases in so far as they have any bearing upon the instant case. As pointed out by the Supreme Court, in those cases the employees were only harbor workers, working on tugs, in a harbor, serving aboard only during the day and going home each night, and not members of the crew, even of any particular tug. Such material difference in the status of the plaintiffs, in those cases, was the basis of the decisions of those cases. But whether those cases were correctly decided or not, certainly they have nothing in common with the facts of the instant case where the respondent signed up on the Fort Bragg for a voyage from San Francisco to Columbia River ports and return, and at the end of the voyage was expected to sign a payroll that indicated at least, that he could have been imprisoned for disobedience of orders (R. 113) and where the respondent

lived aboard the vessel night and day (R. 50) as an A. B. Seaman (R. 16) attached to the vessel.

In other words, counsel's two cases, in fact illustrate the difference between the application of the defense of assumption of risk as applied to land workers, which plaintiffs were, practically, in the two cases cited, and its application as applied to seamen. The court in those cases recognizes the rule as above but holds the plaintiffs there should be excepted as they were not in fact. seamen.

There could not well be a distinction as to rights and obligations as between so-called coastwise seamen and deep-sea seamen, for the reason that the Act would not then have a uniform application, which it must have. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 387. It would permit seamen to render one sort of obedience when five miles off the coast as a coastwise seamen and another sort of obedience when five miles off the coast as a deep-sea seaman, and still another kind of obedience when the ship happened to be in port; which attempted distinctions would be subversive of that discipline imposed upon and required of seamen from early times.

The Refusal of the Trial Court to Give the Specific Instructions on Assumption of Risk Requested by Petitioner Was Not Prejudicial or Reversible Error Even If Such Instructions Could Have Been Legally Given Under the Facts, for the Reason That They Were Not Properly Framed Nor Did They Correctly State the Law.

Counsel under the first and second specification of error complains that he was deprived of a substantial right accorded to him under the Jones Act and the Federal Employer's Liability Act by the court's refusal to give two

specific instructions which he refers to as being in the record, "and generally the instructions discussed in Specifications of Error 1 to 6 inclusive" (Pet. Br. 28). As to the instructions referred to in petitioner's other specifications of error 3 to 6 inclusive, respondent will refer to them where they are mentioned in those specifications.

Although 17 proposed instructions are included in the record, under these two first particular specifications, petitioner has abandoned any objection except as to instructions number II and III (R. 94). Counsel does not attempt to justify these two specific instructions except in a general way by his previous argument, and does not print them in his argument.

The entire charge of the court is not printed, as required, 4 *C. J.* 546.

As to Instruction No. II, it is:

> "If you find as a fact that the plaintiff assumed the risk of the particular danger which caused his injuries, he cannot recover anything in this action."

For the legal reasons hereinbefore stated the instruction could not properly be given, and it was not proper to be given for the additional reason that it was entirely too general, in not defining in any way whatsoever for the jury, what facts might constitute assumption of risk.

II.

Reply to Petitioner's Third Specification of Error

"Refusal of Instructions Concerning Choice of Methods of Work"

Under this heading (Pet. Br. 28) counsel claims that the petitioner was also denied substantial rights accorded

to him by the Jones Act by the court's refusal to give his instructions numbered VII and XI, giving merely the record reference of these two instructions, without attempting to justify the specific instructions, except generally.

Neither of these instructions purport to be upon the defense of assumption of risk. They are both, as a matter of law, directed toward contributory negligence which is not a bar. Nevertheless both of the instructions conclude, that if respondent could have performed the work in a manner involving no risk of the edge of the deck load giving away or of falling into the hold that *the plaintiff could not recover in the action.* As noted in the statement of the case, both Spencer and Paul testified that the work was being done in the only way possible to do it under the circumstances. There was, in fact, no contradiction of this testimony but only suggestions generally as to how it might have been done, such testimony being given by the petitioner's witness, Captain Samuelson. The general verdict of the jury imports findings in favor of the respondent upon this issue. *Petersen* v. *Klitgaard,* 205 Cal. 516; *Dreyer* v. *Cole,* 210 Cal. 339, supra.

The Alleged Choice of a Dangerous Way, If a Safe Way Was Readily Available, Would Be Only Contributory Negligence Which Is Not a Bar to Recovery.

Counsel cites several cases under this third specification (Br. 29) claiming that they hold contrary to the last heading.

The cases do not so hold. The first case, *Hardie* v. *New York Harbor Drydock Corp.,* 9 F. (2d) 545; did not involve a seaman at all, but involved a land worker not in

the actual performance of any duties. There was no defense of assumption of risk set up but the sole question was that of contributory negligence, as appears very clearly from the decision.

In counsel's next case, *Beulah Coal Co.* v. *Verbrugh*, (C. C. A. 8th) 292 Fed. 34, 38, an action by a miner against his employer under the old law of master and servant, the court holds entirely contrary to counsel's contention as follows:

> "From this excerpt (from the testimony) it is too plain for argument that plaintiff was guilty of contributory negligence.
>
> • • • • • •
>
> "But in view of the conclusion • • • that plaintiff was upon the record guilty of the grossest *contributory negligence*, no occasion arises to pursue the subject of assumption of risk, further than the merely general observations set out above."

Counsel's next case, *Williams Cooperage Co.* v. *Headrick*, (C. C. A. 8th), 159 Fed. 680, 683, did not involve a seaman, but was brought by a mill-hand under the old law of master and servant. The only error assigned was the court's failure to grant a motion for an instructed verdict on the ground of plaintiff's *contributory negligence*. And the court says:

> "Where the evidence at the close of a trial so clearly discloses the fact that the *plaintiff was guilty of negligence* which directly contributed to his injury • • • it is the duty of the trial court to instruct the jury to return a verdict for the defendant."

Counsel's next case, *The Indrani*, (C. C. A. 4th) 101 Fed. 596, involved a stevedore in the employ of a con-

tractor engaged in loading the ship. The court points out in that case clearly that it was decided on the theory of contributory negligence and not assumption of risk.

Counsel next quotes some purported language of this court (Br. 29) in *Seaboard A. L. R. Co.* v. *Horton*, 233 U. S. 492, 503, wherein this court is supposed to have said in that case that:

> "Whenever discrimination between them becomes necessary, the use of defective ways or works with notice of the defect and appreciation of the danger is held to be assumption of the risk and not contributory negligence."

No such language appears in the opinion of this court in that case. This was pointed out to counsel in the state courts in Respondent's Reply Brief, as such purported quotation was also set forth in petitioner's brief in the District Court of Appeal.

Counsel's next case, *The Mandalay*, 42 Fed. (2d) 437 was not an action under the Jones Act, but a proceeding for limitation of liability; to determine first, the question of whether there was any liability, and then to limit same, and it was tried without a jury in admiralty. Furthermore, it does not hold as contended by counsel. The decision was not based upon a question of a method of doing work but it was based upon the ground that the seaman was unnecessarily using as a place of work a beam which was not intended as a place to work and where the seaman was not ordered to work or expected to work.

Counsel's next case of *Holm* v. *Cities Service Transp. Co.*, 60 Fed. (2d) 721, is not in point for the reason that the seaman there was not working at all but as the court holds:

> "So a seaman off duty, who has gone for a drink of water and decides to return to his room over a deck he knows is slippery * * * when he knows there is a safe, though somewhat longer way for him to return, must be held to have assumed the known and obvious risks incident to his voluntary choice."

Counsel's next case, *The Romulus,* 1926 A. M. C. 831, 833, is not on the point at all. It was not an action under the Jones Act but was a libel in admiralty for personal injuries against the vessel. It does not appear how the libelant was hurt. The facts referred to in the opinion are very meager. All the court holds is that the libelant was expected to use his experience and skill in doing the work. The trial judge resolved the conflict in favor of the shipowner. No authorities whatsoever are cited in the decision.

Counsel's next case, *Crockett* v. *Brandt,* 271 Fed. 415, has absolutely no bearing on petitioner's point. It was an action for damages for "unseaworthiness". The court states that as the accident could be attributed to the negligence of the mate the shipowner would not be liable but puts this on the ground that the shipowner was not (at the time of that accident) liable for the negligence of a fellow-servant, and holds that the accident was not due to any negligence or lack of care on the part of the owner in making the vessel seaworthy.

Counsel's next case, *West Kentucky Coal Co.* v. *Parker,* 229 Ky. 685, 17 S. W. (2d) 753, was not under the Jones Act at all, although counsel cites it under a heading, "This rule is also followed under the Jones Act." (Br. 30), but was an action under the Federal Employers' Liability Act. There the accident resulted solely from the slipping off

of a line around a timber, the line having been placed there by the orders of plaintiff as vice-principal and under his direction, and he was hit by same after he was warned to stand further away. He was not working under orders.

The leading case in California on this point is *Douglas* v. *S. P. Co.*, 151 Cal. 242, 251, where the court says:

> "When a safe way is provided by an employer and a dangerous way exists, if an employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law. This is the rule universally recognized."

In the recent case *Devaney* v. *Atchison*, etc., R. Co., 219 Cal. 487, 496, the Supreme Court of California re-affirms the legal effect of such negligence:

> "(4) The defendant argues that there was open to the plaintiff a choice between two *methods* of doing the work and that the plaintiff chose the more hazardous. This argument is properly addressed to an issue of contributory negligence which does not appear to have been raised. Moreover, no showing was made that in the ordinary course of his duties the postion taken by the plaintiff was one which he was not entitled to choose." (Italics ours.)

To the same effect is *Payne* v. *Oakland Traction Co.*, 15 Cal App. 127, 140.

Counsel here refers to pick-up hooks again but respondent has already met the suggestion that pick-up hooks might have been used in connection with the particular work respondent was performing, when hurt.

Counsel cites *The Mexoil*, 25 Fed. (2d) 457. The correct title of this case is *June* v. *Pan American Petroleum & T. Co.* But this was not an action under the Jones Act

but was a libel by a seaman to recover damages on the ground of the alleged unseaworthiness of the vessel, consisting in the failure to fit his bunk with a side piece. But the court found that the berth was in fact equipped with the usual side boards and that the seaman would probably not have fallen out of his bunk had he not been intoxicated. Respondent submits the citation has no application.

Counsel also cites *The Mangore*, 1933 A. M. C. 229. The title of this case is *Brittingham* v. *Ore Steamship Corporation*, (C. C. A. 4th). Counsel says that this was an action in admiralty under the Jones Act. It was apparently so filed but it is difficult to perceive how it could be both, as where a seaman elects to sue under the Jones Act he sues at law. It appears from the decision that the only negligence specified was the failure of the shipowner to supply the seaman with goggles, but that even this specification was later abandoned by the libelant because of uncontradicted evidence showing that the injured man himself had charge of goggles supplied by the ship and kept them in his room. It was further shown that in that case that the approved way of doing the work was to wear goggles. So that the basis of the decision was not assumption of risk and the defense was not even mentioned in the decision as having been set up by the owners; but the basis thereof is an utter failure of proof of negligence on the part of the ship owner, as is shown by the following quoted portion of the decision: "* * * we have no authority to find against the owner of the ship in the absence of negligence on its part."

The Supreme Court of California in its decision under attack here, held on this point:

> "The question is not whether the plaintiff properly handled the slingload which he was preparing to be lifted off. That question is rather one of contributory negligence, (see *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503; *McMyler Mfg. Co.* v. *Mehnke*, 209 F. Ed. 5; *Devaney* v. *Atchison, etc., R. Co.*, 86 Cal. Dec. 645; *Engfors* v. *Nelson S. S. Co.*, 280 Pac. 337; *Barker* v. *Kansas City, M. & O. Ry Co.*, 88 Kan. 767, 129 Pac. 1151), and is not otherwise involved in a consideration of the matter before us."

Counsel does not critize the cases cited in support of this holding. The authorities cited by the Supreme Court of California thoroughly support its statement of the law. It is contended that the additional authorities hereinbefore cited by respondent on this point demonstrate, if need be that the principle is well settled.

Hence the specific instructions proposed by petitioner and refused on this subject could not legally be considered as instructions bearing upon the defense of assumption of risk at all and could not therefore, have been given at all as they ended in both instances with a preemptory instruction that the plaintiff could not recover at all, that is that the jury should find a verdict for the defendant. But the subject matter thereof, being only contributory negligence, if anything, such negligence was not a bar. They were not correct statements of the law, and under the particular facts of this case they were argumentative and invaded the province of the jury.

III.

Reply to Petitioner's Fourth Specification of Error

"Refusal of Instructions Concerning Disobedience of of Instructions Given for Respondent's Safety"

Under this heading counsel contends petitioner was denied another right given him by the Jones Act by the court's refusal to give his proposed instruction number VIII (R. 95). This is to the effect that if he disregarded specific orders as to the precautions he should take in doing the work and was injured because he disregarded such specific orders, that the plaintiff could not recover at all.

The answer to this contention is that the case went to the jury upon the general issue as to whether the defendant furnished plaintiff with a reasonably safe place to work.

Counsel refers to the testimony of Captain Samuelson that he had told respondent "not to go inside the load", whatever that may have meant. But we have shown that this alleged instruction according to the captain was shortly after 8 o'clock in the morning, when they were not even working on the landed slingloads next to the open hold but were on top of the heavy timbers, a place of safety; and we have heretofore shown that any such alleged instruction was denied completely by Spencer, a seaman of 8 years' experience on steam lumber schooners, and that he did not need any instructions, and that if he did not know how to do his work that they would fire him. As to Kruse's testimony, we have shown also that he testified that when he saw Spencer and his partner that they were working up even with the heavy timbers whereas it was undisputed that at the time the slingload toppled with Spencer that they were down 6 feet below the heavy timbers. The general verdict of the jury imports findings in favor of respondent upon these issues and hence petitioner could not have been injured by the refusal to give such an instruction. Counsel for petitioner does not contend that this

instruction involved the defense of assumption of risk. It does not mention the subject. It involved at best only contributory negligence, not a bar to the action.

Counsel cites *Grunert* v. *Bush Terminal Co.*, 47 F. (2d) 565. But this was not an action under the Jones Act but was a libel in admiralty brought by the administratrix of a float-man in the employ of the Bush Terminal Company, working aboard a tug in a harbor, and as pointed out by the Supreme Court of the State of California, such employees may be properly excepted from the broad general class of seamen, probably because they are not attached to a ship which goes out in the ocean and are not members of the crew of any certain vessel, do not live thereon, and are not subject to the usual orders and discipline enforced aboard a sea-going vessel, and hence are more analogous to land workers (R. 104). (*Skolar* v. *Lehigh Valley Ry. Co.* 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transp. Co.*, 1934 A. M. C. 441).

There was no dispute as to the instructions in the Grunert case. The case was not decided on the theory of assumption of risk at all but the theory that there was no negligence whatsoever on the part of the respondent and that the libelant was injured solely on account of his own negligence. Even then the court refuses to consider what would have been the situation had the libelant been unable to hold on to the rail with one hand as he had been cautioned to do.

Counsel cites *United States* v. *Lindgren*, 281 U. S. 38; saying that this court holds in that case that the defense of assumption of risk was available to the employer under the Jones Act and that the charge of negligence was furnishing an unsafe place to work. We have carefully

searched that decision and fail to find anything therein that justifies such statement. The only portion applying upon the allegations, and the finding of the trial court or the holding of this court, is where this court points out " * * * the libel does not allege unseaworthiness of the vessel and is based upon negligence alone" 281 U. S. 38, 47 and:

> "The district court found that Barford's death was caused by the negligent installation of the releasing gear in the lifeboat, which permitted it to fall and made this device unseaworthy." 287 U. S. 38, 42.

As far as it appears from the case there was no allegation whatsoever of negligence in furnishing an unsafe place to work and nothing whatsoever in the opinion of this court holding that the defense of assumption of risk was available. The defense is not mentioned. The decision is based entirely on the holding that there was no evidence that the deceased seaman did not leave any surviving heirs of the classes designated as beneficiaries by the Federal Employers' Liability Act who were dependent upon him and hence that under the Jones Act there was no cause of action, and there was no cause of action stated under the old maritime rules on account of unseaworthiness for the reason that the libelant did not allege unseaworthiness and further for the reason that there was no right under the old maritime laws to recover indemnity for the *death* of a seaman although caused by unseaworthiness. And hence that the decree of the Circuit Court of Appeals reversing the decree in favor of the libelant and dismissing it, must be affirmed. Of course, this court further holds that the Merchant Marine Act or the Jones Act, superseded the State Act of Virginia permitting a decedent's personal representative to recover

damages for the death of his decedent arising from the negligent or wrongful act of another.

It was generally held under the old rules of master and servant that a violation of instruction was contributory negligence and not assumption of risk. *Warren* v. *Jackson*, 204 Ill. App. 576. And it was not even considered contributory negligence where obedience to the rule or instruction was not practicable, (*Homes* v. *S. P. Co.*, 120 Cal. 357) or where it was impossible (*Larkin* v. *New York Telegraph Co.*, 220 N. Y. 27), or where a compliance with the rule would have placed the servant in a position as dangerous as that which he assumed by disobeying the rule. (*Anderson* v. *American Lumber Co.*, 138 La. 709.)

IV.

Reply to Petitioner's Fifth Specification of Error

"Refusal to Instruct That Maintenance of Open Holds During Loading and Discharge of Vessel Is One of the Ordinary and Obvious Risks Assumed by Seamen."

Petitioner contends that he was deprived of a right privilege or immunity under the Jones Act by the court's refusal to give his instruction number XIX (R. 98). This instruction flatly requests the court to instruct the jury that the respondent assumed the risk of any injury from a fall into the open hold merely by reason of the fact that he helped remove the hatches and that he knew that the hatches were off, providing the absence of the hatch covers was obvious and apparent. It did not correctly state the law, and it invaded the province of the jury as to questions of fact. The fact that respondent helped re-

move the hatches was not against respondent for the reason that he had nothing to do with it but was doing such work under the orders of petitioner's agent the first mate, and this was improperly included in the instruction. The fact that he knew that the hatches were off did not suffice to compel respondent to assume the risk of being injured by a fall into the hold, 56 *C. J.* 1100; *Grant* v. *U. S. S. B. E. F. Corp.*, 22 Fed. (2d) 488, 491. It appears from counsel's brief (Br. 32) that his only objection to the court's refusal to give this instruction was that it was an indication to the jury that they could find that an open hatch was an ordinary incident of the respondent's employment. It is submitted that certainly this is not a tenable reason, making it proper and correct, for the proposed instruction does not purport to instruct the jury to such effect. As pointed out by the Supreme Court of the State of California in its opinion in this case:

> "The reliance upon the statement in *The Gladiolus*, 21 Fed. 417, that leaving open a common between-deck hatchway while the vessel is lying in port is not presumptive evidence of negligence, is insufficient to require a reversal of the judgment in the present case. There was no contention made in this case that merely leaving the hatch open constituted negligence There is involved the additional elements of the negligence of the defendant in furnishing to the plaintiff an unsafe place to work." (R. 105.)

Petitioner's contention that open hatchways are not *necessarily* negligence, is conceded. Respondent has never contended otherwise. But nevertheless leaving a hold open and unguarded has been held in many cases to be negligence, and of course it depends upon the circumstances of the case. It is contended that under the admitted circumstances of this case, it was gross negligence.

Counsel cite *Smith* v. *United States,* 18 Fed. (2d) 110, 111. This case was not an action under the Jones Act but was a libel in admiralty brought against the ship. The Jones Act is inapplicable when an action is brought in *rem*; in such a case the old law prior to the Act is applicable. *The James E. Ferris,* 1932 A. M. C. 1410 (U. S. D. C. W. D. N. Y.) "*McLean* v. *Ferris.*" But in the Smith case the libelant was not ordered in any event to perform any duties around hatch number 2 and had no necessity to go there. The ship was in process of loading. The general statement which counsel cite from that case might or might not be applicable to any specific case. In the Smith case the hatch covers had been removed by the ship's crew and the Court holds: "therefore if there was any negligence, it was on the part of fellow members of the crew, and the libelant cannot recover from the owner or ship for this." Since under the Jones Act the fellow servant rule has been abolished as a defense, the case would not be applicable in any event.

Counsel's Seventh, and his Eighth, and Ninth Specification of Error make practically the same contention as this Fifth Specification of Error.

V.

Reply to Petitioner's Sixth Specification of Error

"Refusal to Instruct Upon the Legal Effect of Assumption of the Risk and That If Proven to the Satisfaction of the Jury This Defense Is a Complete Bar to the Action."

Under this specification counsel contends that this court should reverse the judgment of the Supreme Court of the State of California for failure to give

petitioner's proposed instruction number II (R. 94). But he has already presented this instruction and discussed same under his First and Second Specifications of Error (Pet Br. 28) and we have replied to same there. (Point I.) Counsel presented the same case there as he presents under this specification, *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893, the citation of which has already been met (Res. Br. I) and we have further shown that the instruction was entirely too broad and general; failed to define the defense at all, and failed to state under what facts it would be applicable if at all; and was not applicable under the facts of this case. Counsel quotes a purported passage from the decision in *Skolar* v. *Lehigh Valley R. R. Co., supra,* (Pet. Br. 34) which does not appear in that decision at all. That quotation is, however, from the case of *Southern Ry. Co.* v. *Hermans,* 44 Fed. (2d) 366, cited under the quoted phrase. But in the Hermans case again, the seaman was merely a harbor-worker employed on the defendant's tug. It is noteworthy that the U. S. Circuit Court of Appeals says in the case of *Southern Ry. Co.* v. *Hermans,* 44 Fed. (2d) 366:

> "It was clearly a matter for the jury to determine whether the intrusting of this responsibility to the deckhand charged with other duties was an adequate performance of the defendant's duty to exercise reasonable care to furnish its employees with a reasonably safe place in which to work."

Counsel refers to *Pryor* v. *Williams,* 254 U. S. 43, but this was an action under the Federal Employers' Liability Act, which it has been shown is governed by different considerations and instructions on assumption of risk, than are actions under the Jones Act.

Counsel also cites *McMyler Mfg. Co.* v. *Mehnke,* 209 Fed. 5. That case was decided before the Jones Act was enacted. It was an action brought by a machinist against a manufacturing company under the law of master and servant, and hence it is submitted would not be in any event a binding authority against a seaman in an action under the Jones Act.

Counsel cites *McGinn* v. *North Coast Stevedoring Co.,* 149 Wash. 1, under his statement that:

> "the refusal to instruct the jury upon the legal effect of assumption of the risk denied petitioner a very substantial right under the Jones Act." (R. 35.)

But the case cited was not an action brought under the Jones Act, and plaintiff and respondent was a stevedore and not a seaman. The case does not hold any such thing as counsel indicates, but the judgment in favor of the stevedore was reversed for the sole reason that the Supreme Court of Washington held that it was prejudicial error for the trial court to refuse to give a requested instruction defining a *latent defect.* (149 Wash. 20). We have heretofore cited this case as an authority for respondent for the reason that the Supreme Court of Washington lays it down as a rule of the common law.

> "(12) The law is also well settled that the employee does not assume the risk of his employer's negligence or the negligence of his agents or employees in the nonperformance of a nondelegable duty. *Arneson* v. *Grant Smith & Co.,* 120 Wash. 98, 206 P. 960; *Mattson* v. *Carlisle Packing Co.,* 123 Wash. 243, 212 P. 179."

And we have heretofore shown that the duty of an employer to furnish his employee with a reasonably safe

place to work is a primary and non-delegable duty.

VI.

Reply to Petitioner's Seventh Specification of Error

"Maintenance of Open Cargo Hold During Loading and Discharging Is Not Negligence"

Counsel for petitioner under this point contends generally that an open hatchway on a ship is not evidence of neglect. That is too broad a statement. It depends entirely upon the circumstances. Counsel under this point does not discuss assumption of risk. The instruction which petitioner contends should have been given is his instruction number VI (R. 95) asking the court to instruct the jury flatly.

> " * * * that it is not negligence for the defendants to have the hatches of the Fort Bragg off while she is in port loading or discharging cargo from her hold."

In the first place the instruction was not at all applicable under the facts as it was undisputed and admitted that the vessel was not loading or discharging any cargo from her hold; at least the entire morning that respondent was hurt.

Counsel cites *Dwyer* v. *National S. S. Co.*, 4 Fed. 439, but there the decedent was a land employee employed by an independent contractor. He had been working in the hatchway itself. He stepped upon a section of the grating of the hatch and it tilted under his weight and he fell through the hatchway. The court says:

> "If I were convinced that the condition of the hatchway at the time of the accident was proof of a

> failure on the part of the defendant to discharge a duty attaching to him in respect to the hatchway, I should find no dfficulty in holding the defendant liable whether the grating was misplaced by the stevedores, the elevator men, or the crew of the vessel."

Counsel's next case, *The Gladiolus,* 21 Fed. 417 (1884) involved a fall by a stevedore through a coal bunker hatch. There was no deck load involved. The court says:

> "The leaving open a common between-deck hatchway, while the vessel is lying in port, *under ordinary circumstances,* is not presumptive evidence of negligence on the part of the ship." (Italics ours.)

Counsel's next case, *The Kongosan Maru,* 282 Fed. 666, in contrary to his contention for there it was held that it was negligence under the circumstances of that case to leave the hold open and unguarded and the plaintiff recovered against the stevedoring company by whom he was employed. The action was not brought under the Jones Act but was a libel *in personam* in admiralty.

In counsel's next case, *Long* v. *Silver Line,* 48 Fed. (2d) 15, the hold was not involved at all, but some large steel tanks were necessarily left uncovered for ventilation for the reason that they were to be immediately repaired.

In counsel's next case, *Campbell* v. *Trinidad Shipping & Trading Co.,* 165 Fed. 270, the seaman was not in the course of his duties and was sitting upon the hatch coaming drinking tea, when he fell into the hold. The accident occurred about 7 o'clock in the evening, some hours after work had been terminated. The case is otherwise not applicable.

Counsel's next case *Horne* v. *George H. Hammond Co.,* 71 Fed. 314, is not in point in any way and on the con-

trary makes it very clear that the question of open holds is one depending entirely upon the circumstances of each case as the court there says:

> "the issue is not so brought as to touch upon the duties and responsibilities connected with a ship's hatchway at all times or towards all persons. * * * These duties and responsibilities undoubtedly involve mixed questions of law and fact."

The court states that while under ordinary circumstances it is not evidence of neglect of duty on the part of the shipowner to have an open hatchway, while the hatchway is being employed, that:

> "Of course, like all rules disposing of issues of mixed law and fact, the courts are not permitted to follow it implicitly except in what may be classed as ordinary cases."

Also in counsel's case of *The Gladiolus,* 21 Fed. 417, supra, the court point out that the question as to whether or not leaving the hatch open is negligence, depends upon the circumstances of each case.

It has, of course, been held in many cases to be negligence under the particular circumstances of each case. This court in *Cortes* v. *Baltimore Insular Line,* 287, U. S. 367, 375, expressly recognizes that it is one of the common acts of negligence in seamen's cases.

And in *Petersen* v. *Klitgaard,* 212 Cal. 516, the Supreme Court of California says that the duty of the officers of the ship to close the hatch "depends upon the situation".

In *Domandich* v. *Doratich,* 165 Wash. 315, the captain admitted that it was the rule that the hatch was to be kept covered at all times when not in use, (just as Cap-

tain Samuelson did in the instant case.) It was left open when not in use; plaintiff fell into the hold in the evening and had a verdict and judgment for damages, which was affirmed on appeal.

In *Engfors* v. *Nelson Steamship Co.*, 131 Ore. 108, the verdict and judgment of the trial court in favor of the seaman was affirmed, partially at least upon the ground that it was negligence under the particular facts of that case to fail to protect the open hold with a guard along the coaming to prevent workmen from falling into the hold, and in that particular case the hold was being used.

Therefore it is contended that it was not error to refuse to instruct the jury generally as petitioner requested that it was not negligence to leave the hatch open, even if petitioner had not added the subsequent portion making the instruction entirely inapplicable "while she is in port loading or dischargng cargo from her hold."

VII.
Reply to Petitioner's Eighth and Ninth Specifications of Error

"Instructions Given and Refused Concerning the Open Hold in Relation to Safety of Place of Work and Proximate Cause."

Under these specifications of error petitioner groups his objections to two instructions given by the court, as requested by respondent, and one instruction given by the court of its own motion, and one instruction, number II proposed by petitioner and given by the court as amended.

Petitioner complains because the court instructed the jury that the lumber on the deck upon which respondent

was standing next to the open hold, constituted the place furnished by the defendant employer for the prosecution of further work. Petitioner contends that by this instruction the jury were told to consider the open hold and to decide whether that fact rendered the plaintiff's place of work unsafe. But this criticism is not tenable. On the contrary such criticism is obviated by Instruction No. XV-a (R. 91) which petitioner complained of, given by the court of its own motion, whereby the court instructs the jury that in order to determine whether the petitioner provided respondent with a reasonably safe place to work that they must consider "not one condition alone, but the whole situation as presented by the evidence at the time of the accident". The whole situation could not possibly be merely the open hold. But respondent's position on top of the landed slingloads where he had been ordered to work was, of course, his place to work. It could not be otherwise. If the petitioner saw fit to leave the hold open immediately adjacent to where respondent had to stand, when there was no occasion to leave the hold open, and when there was a protest, and when it could have been speedily closed, the petitioner could not well expect the jury or the court to close their eyes to the fact that the open hold was a component and immediate part of the place of work. One of the leading cases defining the place of work is *Sebald Brewing Co.* v. *Tompkins,* (C. C. A. 6th) 221 Fed. 895, where a workman fell through a hole on a roof, to the concrete floor of the room below. And the court says:

> " * * * we think that any part of the roof, as near the boards as the portion of the roof was through which the plaintiff fell, may well be found by the jury to be a place furnished by the company for its employees to work."

And in *Blosky* v. *Overseas Shipping Co., Inc.*, 219 App. Div. 438, where plaintiff was a longshoreman not suing under the Jones Act the Court says:

> "It is one of the fundamental principles applicable to the relation between employer and employee that the employer is charged with the positive duty of furnishing to his employees a safe and proper place in which they are to do the work required of them. This duty extends to the premises in which the employees are put to work; the machinery supplied for doing the work, and all of the appliances provided for their use."

It is contended that instruction number XV-a was a very favorable one to the petitioner as it is calculated to take the jury's mind away from the open hold which the petitioner most desired, and to place it upon the broad general ground as to whether or not under all the circumstances of the business the petitioner had furnished his seamen with a reasonably safe place to work. In considering the negligence in refusing to close the hold it is quite apparent that if respondent had fallen with the toppled boards from the slingloads only 6 feet to the hatch covers if they had been on over a *closed* hold, he might not have been injured at all, or only very slightly, but the hold being open, causing him to fall 18 feet to the bottom of the hold, it is quite apparent that the open hold contributed proximately to his injuries. As to petitioner's Instruction No. XIV (R. 97) which counsel refer to in the body of the argument (Br. 40) but not in its premise, which instruction petitioner proposed and which was refused, this was an attempt to have the jury instructed that they could not consider the open hold at all as negligence and that it could not be the proximate cause of the plaintiff's injuries. The instruction did not comport with

the facts and furthermore is not correct as a matter of law. In 45 *C. J.* 920, the rule is set forth:

> "Where the injury results from two or more causes for all of which defendant is liable, it is immaterial which was the proximate cause."

Furthermore it is well settled that the question as to what actually constitutes proximate cause is for the jury. There was only one general act of negligence alleged and that was in failing to provide the plaintiff with a reasonably safe place to work and the court specifically instructed the jury that they could not find a verdict against the defendant unless his negligence was the proximate cause of the plaintiff's injuries (R. 149) Instructions XXVIII, XXIX. Also Instruction No. II (R. 91) requested by petitioner and given, as amended.

The Controversy Does Not Present a Federal Question of Gravity and General Importance

Although petitioner's counsel makes considerable argument as to what the facts were in this case and as to the jury's being permitted to consider the open hold as a portion of the place to work, it is submitted that the only real contention which has any shadow of merit is that the petitioner was deprived of a right, privilege, or immunity under a statute of the United States, to-wit, the Jones Act, by the court's refusal to give certain specific instructions allegedly bearing upon the defense of assumption of risk.

The respondent has never contended but what the defense of assumption of risk when available under the facts, was available as against a seaman under the maritime law. The Supreme Court of the State of California

in its judgment now under attack, expressly recognizes that such a defense is available in actions under the Jones Act when applicable under the facts of some particular case. But under the facts of the instant case, even under the common law, it is submitted that the defense would not have been available. And the determination of the common law is exclusively within the jurisdiction of a state court and this case could have been decided on that basis alone. *McGinn* v. *Northcoast Stevedoring Co.*, 149 Wash. 1.

The decisions of this court establish that under the principles of the common law even a land worker does not assume the risk of his employer's negligence in failing to make the work place reasonably safe. *Hough* v. *Railway Co.*, 100 U. S. 213, 215; *Chesapeake & O. Ry.* v. *Proffitt*, 241 U. S. 462, 469. And in the last mentioned case, this court considers instructions similar to those proposed by petitioner here to be entirely improper and inapplicable under well settled principles. The same rule obtains in the lower Federal Courts. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Hall* (C. C. A. 6th) 243 Fed. 76, 80; *Panama R. Co.* v. *Johnson* (C. C. A. 2nd 289 Fed. 964, (quoting from *Labatt on Master and Servant*, vol. 4 (2d. Ed.) p. 3934); *Harvey* v. *Texas & Pacific Ry. Co.*, (D. C. M. D. Pa.), 166 Fed. 385, 392; and in the state courts, *Hoogbruin* v. *Atchison R. Co.*, 213 Cal. 582, 592; *Devaney* v. *Atchison etc., Ry. Co.*, 219 Cal. 487; *Boatman* v. *Miles*, 27 Wyoming 481.

And the common law rule as to the non-assumption of risk by a servant when he is working under any kind of coercion, is practically the same as it is with regard to a seaman. 39 C. J. 794; *Shearman & Redfield on Negligence*,

vol. 1 (6th ed.) sec. 211a; *Panama R. Co.* v. *Johnson* (C. C. A. 2d) 289 Fed. 964.

This court has said in a great many cases that where the record shows that, although there may be a federal question in the case, there is also an independent question not federal in character, decided by the state court, which is in itself broad enough to sustain the judgment, the state decision is not reviewable by this court. *Winter City Counsel* v. *Montgomery,* 156 U. S. 385; *Johnson* v. *Risk,* 137 U. S. 300.

Also the judgment of the Supreme Court of the State of California is by no means a decisive decree that assumption of risk is not available as a defense under the Jones Act, but on the contrary, assumes that it is. And hence the judgment does not actually raise a federal question.

This court has held that it did not regard the inquiry as to:

> "whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." *In the Matter of John Woods,* 143 U. S. 202.

In *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440, the grounds of Petition for Writ of Certiorari were the refusal of the trial court to submit certain questions to the jury; (substantially the grounds in the instant case.) But the court says:

> "The propriety of submitting these matters de-

pended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the circuit court of appeals reached the same result. 141 C. C. A. 264, 226 Fed. 434.

The record discloses no sufficient reason within the rule long observed why we should review the judgment below. *Forsyth* v. *Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665.

Dismissed."

It is submitted that the main weakness in petitioner's application is that he cannot, or does not, controvert in any way the authorities cited by the Supreme Court of the State of California in support of its decision. Not a one of them is even assailed. This is, it seems, in the nature of an admission that those authorities do amply support the judgment he attacks and if this be admitted, then such judgment is not in conflict with any decision of this court or of any Federal Court and petitioner shows no ground whatsoever for the application for the writ.

A mere error of judgment by the state court, in misapplying the law or adjudging the facts but adjudging nothing obnoxious to the constitution, treaties or laws of the United States, does not make its judgment reviewable (*Columbia Ry., Gas & Electric Co.* v. *South Carolina,* 261 U. S. 236) unless the error is so gross and the decisions so arbitrary or fraudulent as to deny due process of law or the equal protection of the laws. (*Baker* v. *Druesedow,* 263 U. S. 137.)

This court has already considered the same points as now raised in *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 393.

In that case this court affirmed the judgment of the Circuit Court of Appeals in favor of the seaman under the Jones Act; the judgment under review largely defining the application of the defense of assumption of risk as against a seaman. In considering the effect of the denial of requested instructions on assumption of risk this court says:

> "The defendant also complains that two requests which it preferred on the subject of assumption of risk were denied. The requests were so framed that, considering the state of the evidence, they would not have conveyed a right understanding of the subject, and might well have proved misleading. Their refusal was not error." (264 U. S. 393.)

CONCLUSION

This respondent seaman tried his case in the state court for many days before a jury at a very great expense, and obtained a verdict of the jury for $10,000.00 which the trial court reviewed and reduced the judgment to $7,000.00 and denied the motion for new trial. This is the fourth reviewing court which has been asked to review the record and if and when the judgment in favor of this respondent becomes final, the petitioner can still take the respondent into the U. S. District Court and seek to limit his liability. The seaman's injuries were sustained on May 4, 1931.

It is submitted that in view of the foregoing authorities, that the judgment of the Supreme Court of the State of California in this case is legally correct, and in view of the particular facts, eminently just, and in accord with that liberal construction of the Jones Act which this court enjoined in its two decisions of *Bainbridge* v. *Merchants*

& *Miners Transp. Co., supra,* and *Cortes* v. *Baltimore Insular Line, supra.* The judgment of the Supreme Court of the State of California is also thoroughly in accord with section 4½ of Article 6 of the Constitution of the State of California, providing:

> "Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (As amended November 3, 1914.)

It was nothing new, as shown, to send the case to the jury upon the issue of safe place to work, *Hanson* v. *Luckenbach Steamship Co., Inc., supra; States Steamship Co.* v. *Berglann, supra.* Petitioner's counsel themselves admitted that if the court had properly instructed the jury on negligence that the respondent was probably entitled to send the case to the jury on the issue of safe place to work.

If the judgment should now be reversed by this court and this respondent seaman be compelled to go back and go through all of the long trial again before a jury with the consequent heavy expenses, it is inconceivable, under the facts of this case, how the petitioner could obtain any different result, with any instruction given which this court might hold must be given. Where that is the condition of the case, it is submitted that the judgment will not be reversed merely for failure to give an instruction. *Devaney* v. *Atchison,* 219 Cal. 487, 495; *Jackson* v. *the Lac-*

tern Co., 209 Cal. 520; *Dullanty* v. *Smith*, 203 Cal. 621; *Fox* v. *Ravera*, 122 Cal. App. 35; 2 *Cal. Jur.* 981.

It is submitted that this case does not present a federal question of gravity or general importance, and therefore that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. MCNAB,
A. DON DUNCAN,
Attorneys for Respondent.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 676

October Term, 1935

GEORGE S. BEADLE,
Petitioner,

vs.

ALFRED SPENCER,
Respondent.

Affidavit of A. Don Duncan Regarding Admission in Appellant's Opening Brief.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS:

A. DON DUNCAN being first duly sworn deposes and says:

That he was at all times in the Courts of the State of California, the attorney for the respondent above-named, and is familiar with and personally handled the preparation of all briefs therein, and that said affiant's name is now on the brief before this court on Petition for Writ of Certiorari.

That the following appears in the opening brief filed in the District Court of Appeal of the State of California by above named George S. Beadle, as defendant and appellant in the said case.

"Had those physical conditions which did not, as a matter of law, constitute negligence, and which could not, as a matter of law, be the proximate cause of the plaintiff's fall, been eliminated by the trial court, or had it given proper instructions as to each act of negligence relied upon, as it should have done, the plaintiff would, perhaps, be entitled to have the case sent to the jury upon the issue of safe place to work."

(Signed) A. DON DUNCAN.

Subscribed and sworn to before
me this 29th day of January, 1936.

(Seal) Louis Wiener,
Notary Public in and for the City
and County of San Francisco.